Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

PAUL ROBERTS HAMWI,

Petitioner,

v.

WALTER A. McNEIL, Secretary,
Florida Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

WHETHER THE STATE OF FLORIDA UPON FINDING THAT THEIR CASE AGAINST PETITIONER WAS COMPROMISED, WHEN A FINGERPRINT EXPERT REPORTED THAT A LATENT-PRINT FOUND AT THE SCENE OF THE CRIME DID NOT BELONG TO THEIR STAR WITNESS AND INSTEAD BELONGED TO [HIS] SON, INTENTIONALLY CONCEALED THIS EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND, SO* TO INSURE A CONVICTION AGAINST PETITION, WHO IS ACTUALLY INNOCENT OF THE CRIME?

WHETHER THE STATE'S CONCEALMENT OF A MEMORANDUM WRITTEN BY STATE PROSECUTOR ANTHONY LOE, CONFIRMING THE FINDING OF A LATENT PRINT BELONGING TO THE SON OF THE ALLEGED CONFESSED MURDER AND STATE'S STAR WITNESS, PREJUDICED PETITIONER'S ABILITY TO IMPEACH THE CREDIBILITY OF THE WITNESS WHO WAS ACCUSING HIM OF A MURDER FOR HIRE PLOT?

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PETITION FOR WRIT OF CERTIORARI

Paul Roberts Hamwi respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in Case Number 08-13342-J in that court on September 12th, 2008, in *Paul Roberts Hamwi v. Walter A. McNeil, Secretary, Department of Corrections.*

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *Paul Roberts Hamwi v. Department of Corrections,* Case No.: 08-13342-J (11th Cir. September 12th, 2008) is reproduced at Appendix Exhibit "X". The opinion of the United States District Court, Southern District of Florida is unpublished and is reproduced in Appendix Exhibit "V". The Report and Recommendation of the United States Magistrate Judge is unpublished and is reported at Appendix, Exhibit "Q".

The Decision's of the Fourth District Court of Appeal of Florida, regarding Mr. Hamwi's challenge to the Constitutionality of the State Court Conviction and Sentence in his Motion for Post Conviction Relief is published at, *Hamwi v. State,* 805 So.2d 101 (Fla. 4th DCA 2002) (Reversed for Evidentiary Hearing); and after evidentiary hearing, at *Hamwi v. State,* 913 So.2d 609 (Fla. 4th DCA 2005) (Table) *per curiam affirmance.*

STATEMENT ON JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on September 12, 2008. This Petition being filed within 90 days of the Eleventh Circuit's denial pursuant to Supreme Court Rule 13.1, is timely filed.

STANDARD OF REVIEW

The Court of Appeals finding that Petitioner failed to assert a claim of constitutional proportions is reviewable even when there is no reasoned opinion in the lower court other than Petitioner's lack of assertion of a constitutional deprivation. *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996), where this court greatly expanded the "No Fault, Vacate and Remand (V & R) practice," and where the Petitioner/ Appellant has advanced a meritorious *Brady* claim. See also, *Youngblood v. West Virginia*, 126 S.Ct. 2188, 2189-90 (2006).

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Constitutional Amendment VI

> . . . the accused shall enjoy the right to a speedy and public trial, by impartial jury . . .

be informed of the nature and cause of the accusation; . . . be confronted with the witnesses against him; . . . to have compulsory process for obtaining witnesses in his favor; . . . and to have the assistance of counsel for his defense.

U.S. Constitutional Amendment XIV, §1

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Title 28, United States Code, Section 2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim —

(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States.

STATEMENT OF THE FACTS

Paul Roberts Hamwi, (Mr. Hamwi) was born June 21st, 1946 in Columbus Ohio. He attended elementary and high school there upon graduation enrolled at Ohio

State University (1965-66). Mr. Hamwi dropped out of OSU after completing 18 months of classes, in order to enlist in the Marine Corp, and serve a period of his enlistment in Vietnam.

Upon honorable discharge, Mr. Hamwi moved to Colorado for employment purposes and worked for a time as a Licensed General Contractor and Real Estate Broker. Mr. Hamwi subsequently incorporated his own business, "Colorado Construction Company," (CCC) a General Construction / Land Development and Real Estate Brokerage.

Mr. Darryl Grob (Grob) was employed by Mr. Hamwi as a Corporate Vice President, it was through Grob that Mr. Hamwi met and hired Robert W. Beckett, Sr., (Beckett, Sr.) as a Construction Foreman.

Prior to his hiring Beckett, Sr., had flown to Colorado from California to meet and interview with Mr. Hamwi and as a prerequisite to his hiring, Beckett, Sr. borrowed $5,500 from Mr. Hamwi, in order to have the funds to relocate his family from California to Colorado. Beckett and his wife Cathy signed a promissory note and payment schedule to reimburse the loan, which was lent to the Beckett's through Mr. Hamwi's Corporation.

Beckett was constantly late in meeting his obligation to repay the note. The Corporate file kept on Beckett was amended twice, once in 1984 and again in 1986. It was the 1986 amendment that included as part of the payment schedule, that Cathy Beckett would clean

Hamwi's corporate offices. Beckett declared bankruptcy in 1988 at which time he still owed Mr. Hamwi $6,365.00[1] on the balance of the loan.

Mr. Hamwi met Susan Bolender who was on a ski vacation in Aspen Colorado during the winter of 1978, and they saw each other over the next three years, when Susan came to Colorado on vacation. Susan became pregnant during this relationship and Mr. Hamwi and Susan Bolender entered into a marriage of convenience on October 26, 1981, a prenuptial agreement was signed.

The Hamwi's separated after only a month and Mrs. Hamwi moved back to the Florida home she maintained at Poinsettia Drive, Fort Lauderdale, Florida. Shane Hamwi, their daughter was born May 12th, 1982.

Mr. Hamwi filed for divorce during September of 1982, which became final on June 29, 1983. The court ordered the prenuptial agreement void and directed Mr. Hamwi pay Mrs. Hamwi $12,000.00 in cash and $500.00 per month in alimony until the child reached school age and thereafter payments of $500.00 per month in child support, until the child reached the age of maturity.

On or about November 8th, 1983 Susan Bolender Hamwi (Mrs. Hamwi) was found murdered in her home in Fort Lauderdale, Florida. At the same time Mrs. Hamwi's body was discovered, it was also found that Shane Hamwi, Mr. & Mrs. Hamwi's eighteen (18) month old daughter, had died of dehydration due to

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[1] Principle, plus Interest.

being left unattended. Her death was estimated to have occurred approximately 24 hours prior to being found.

Police investigating the crime, focused their attention on a neighbor, John Purvis, (Purvis) a schizophrenic who lived with his mother, and who frequented the area around Mrs. Hamwi's home.

Police convinced Purvis and his mother Emma Jo Bartlett (Ms. Bartlett) to come to the police station, where after separating the two, proceeded to interrogate Purvis regarding the Hamwi murder. Purvis, after being advised of his *Miranda* rights consistently denied any involvement in the crime. It was during this interrogation, the police learned of Purvis's history of psychiatric treatment for chronic schizophrenia, his *eight to* ten *year* old *mentality*, and his dependence on his mother. Purvis's mother ended this interrogation after she observed one of the police detectives push Purvis into a chair when he tried to leave.

Ms. Bartlett, hired an attorney who advised her not to allow Purvis to speak to the police without the lawyer being present. However, police detectives contacted a Psychiatrist, Dr. Klass, who told police if they could question Purvis alone they could get more information.

Thereafter, detectives learned that Purvis made weekly trips to the neighborhood drugstore to buy a T.V. Guide. The police asked the pharmacist to inform them of Purvis' next visit. On January 3, 1984, the pharmacist called police that Purvis would be coming to the drugstore to buy the T.V. Guide. Detectives

followed Purvis to the drugstore and approached him before he could enter. Police tried to convince Purvis to go with them to the Police Station, Purvis asked to call his mother, however, police told him he could call her from the Police Department. When Purvis arrived at the police station detectives placed him in an interrogation room, where he again renewed his request to call his mother.[2] Police duped Purvis into believing they were calling his mother and there was no answer at his home.

Police summoned Dr. Klass to the police station where they allowed the psychiatrist to interrogate Purvis. It was after this interrogation that consisted of questioning by Dr. Klass, both police detectives and showing Purvis pictures of the crime scene that Purvis eventually confessed to the murder of Susan Hamwi.

In January 1984 a grand jury returned a three-count indictment against Purvis, charging him with (1) First-degree Murder of Susan Hamwi; (2) Sexual Battery of Susan Hamwi, with great force; and (3) Second-Degree Murder of Shane Hamwi.

Purvis was convicted on all counts of the indictment and sentenced to one term of life imprisonment with a two consecutive terms of 20 years each for the sexual battery and death of Shane Hamwi.

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[2] It was later testified to at a suppression hearing, that during this interrogation at the police station, Purvis had requested numerous times (15 or more) that police contact his mother.

In May of 1985, shortly after sentencing and while Purvis's direct appeal was pending, Michael Satz, the State Attorney for the Seventeenth Judicial Circuit, along with Assistant State Attorney's Ralph Ray, and Robert Carney, and Investigator Barbara Barton, received information indicating that Robert Beckett, Sr., had committed the murders. Michael Satz, and Barbara Barton, his investigator conducted some additional investigation and learned that Robert Beckett, Jr.'s girlfriend had told Colorado authorities that Robert Beckett, Jr. had implicated his father in the murder of Susan Hamwi. *Notwithstanding this information, Robert Carney,*[3] *a prosecutor in the State Attorneys Office, instructed Barton to close the investigation.*

At that time, none of this exculpatory information was disclosed to Purvis, his guardian or his attorney. As a result Purvis' direct appeal was affirmed in *Purvis v. State,* 500 So.2d 1360 (Fla. 4th DCA 1987) (Table).

Subsequently, on Petition for Writ of Habeas Corpus to the United States District Court for the Southern District of Florida, where Purvis challenged the custodial interrogation and reliability of the confession on motion to suppress, the Southern District denied relief, and in a written opinion the Eleventh Circuit Court of Appeal affirmed in a split decision. *See, Purvis v. Dugger,* 932 F.2d 1413 (11th Cir. 1991).

Purvis remained imprisoned for approximately nine (9) years before this exculpatory information was

[3] Robert Carney is now a sitting Circuit Court Judge in the Seventeenth Judicial Circuit, Broward County, Florida, the same Circuit that Mr. Hamwi was tried and convicted.

revealed and a subsequent investigation established that Purvis was innocent.

On October 1, 1992, Fort Lauderdale Police received a demand for records from Purvis' lawyer. Police learned that a story was being prepared for *tabloid television* about the crime. On October 9, 1992, police began investigating Robert W. Beckett, Sr., as a suspect in the Hamwi murders.

Fort Lauderdale detectives flew to Aspen Colorado to speak with police there regarding Beckett, Sr. They also attempted unsuccessfully to speak with Robert Beckett, Jr., who was serving a life sentence in Folsom Prison in California for another murder that he and his father had committed.[4] However, on or about November 17, 1992, Fort Lauderdale Police met with Beckett, Sr.

According to police, the State Attorney assigned to the case decided to give Beckett, Sr. immunity because the investigation was not proceeding according to plan and at this point there was a sense of urgency because of the planned *tabloid television program* that was about to air. Without any qualified information to support the theory, police claimed to have believed that a man named Paul Schiro (Schiro)[5] was the actual killer and

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[4] Robert W. Beckett, Jr., confessed to murdering one Tracy Lea Stewart, whom he and his father (Beckett, Sr.) had allegedly raped and murdered in 1981, (who's body has never been recovered). Beckett, Jr., refused to testify against Beckett, Sr. in that case and California authorities could not proceed with prosecution against Beckett, Sr. for that murder at that time.

[5] Paul Schiro, an Arizona resident known as the "Ice Man," who was a suspect in at least a dozen mob-type murders, without any qualification, became a prime suspect in the Hamwi murder.

that Beckett, Sr. was involved in a lesser capacity, hence they felt the immunity offer was proper.

Sometime between November 23, 1992 and December 14, 1992 Police and Prosecutors interviewed Beckett, Sr. several times, it was during these interviews, Beckett, Sr. later testified, that Florida Authorities brought up the name of Mr. Hamwi, and decided to offer Beckett, Sr., transactional and use immunity for his testimony without requesting a proffer of that testimony prior to the grant. The decision to grant immunity was approved by Assistant State Attorney's Ralph Ray[6] and Anthony Loc.

According to Police it wasn't until they began to take Beckett Sr.'s statement of the events leading up to the crime, that they realized that Beckett was implicating himself to be the actual murderer, and although Detective Bronson denied bringing up Hamwi's name to Beckett, during the interviews Beckett, testified that it was Bronson who first raised Hamwi's name.[7]

On December 22, 1992, Fort Lauderdale Police arranged for Beckett, Sr. to make telephone calls to

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[6] Assistant State Attorney Ralph Ray was the same prosecutor who doggedly pursued the case against John Purvis, and who ordered the investigation that would have exonerated Purvis to be halted.

[7] Beckett, Sr. later named Paul Serio as his accomplice in Mrs. Hamwi's murder, they had been friends for many years, and belonged to the Society for Creative Anachronism, an organization that stages medieval events and battles. Serio had assisted Beckett in debt collections.

Mr. Hamwi in the hope of eliciting "incriminating statements." After several calls from Beckett, Sr. to Mr. Hamwi, asking for help and making reference to the murder's that Beckett said he committed on Hamwi's behalf, Mr. Hamwi never acquiesced to these inferences and denied that he had any involvement in the crime or that he knew what Beckett was talking about.[8]

Based on Beckett, Sr.'s statement the State of Florida presented evidence before the Grand Jury, which subsequently returned an Indictment against Paul Roberts Hamwi and Paul Serio on January 12, 1993 for two counts of first-degree murder; Police arrested Paul Serio in Texas on January 13, 1993 and Mr. Hamwi in Aspen Colorado on January 14, 1993.

On joint motion of the State of Florida and John Purvis's attorney, on January 14th, 1993, a Circuit Court Judge set aside Purvis's conviction and sentence, John Gordon Purvis was set free.

PROCEEDINGS IN STATE COURT

Mr. Hamwi and Paul Serio were tried in a joint trial that took place January 12, 1994 through March 23, 1994, and were subsequently convicted of one count of

[8] The conversation during the final police instigated call from Beckett to Hamwi, Mr. Hamwi asked Beckett; "What are you accusing me of," Beckett responded; "Nothing, I'm just trying to get some help." Beckett later admitted that he was trying to put words in Hamwi's mouth.

first-degree murder.[9] Sentencing was set for June 24, 1994, at which time Mr. Hamwi was sentenced to Life in Florida Department of Corrections.

Appeal was taken to the District Court of Appeal for the Fourth District of Florida, where Mr. Hamwi argued: (1) Trial court erred in refusing to permit Hamwi to prove the commission of the previous murder by the State's star witness, where the State opened the door to the admission of the facts of the murder and the evidence was both substantively admissible and relevant to the credibility of the witness and the lead detective in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution; (2) Trial court erred in admitting the testimony of two witnesses for whom Serio had offered to commit a contract killing where such testimony constituted inadmissible hearsay, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution; (3) Trial Court erred in permitting the State to introduce irrelevant evidence of Hamwi's purported failure to pay his Family's Funeral Bills, where such evidence unfairly besmirched Hamwi's character, in violation of the Fourteenth Amendment to the U.S. Constitution; and (4) Trial court erred in permitting the State to comment on Hamwi's purported failure to come forward with exculpatory statements before trial and his silence at trial, in violation of the Fifth, and Fourteenth Amendments to the U.S. Constitution.

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[9] Mr. Hamwi and Paul Serio were acquitted of the murder of Shane Hamwi, Count II of the indictment.

The Fourth District affirmed in *a per curiam* decision reported at *Hamwi v. State*, 681 So.2d 291 (Fla. 4th DCA October 9, 1996) (Table).

Mr. Hamwi filed a Motion for Correction of Illegal Sentence in the trial court on May 7, 1997, as grounds Mr. Hamwi challenged the court's imposition of restitution as a condition of his sentence. The trial court denied the motion on July 17, 1997.

Mr. Hamwi next filed a Motion for Post Conviction Relief, (PCR) pursuant to Florida Rules of Criminal Procedure, Rule 3.850, w/attached Memorandum of Law in Support on January 5, 1998, the motion asserted as grounds for relief: (1) The prosecution's presentation of and/or failure to correct material false testimony; (2) The suppression by the prosecution of favorable evidence; and (3) Denial of the effective assistance of counsel. (Appendix, Exhibit "A & B"). The trial court summarily denied relief on September 14, 1997 and after motion for reconsideration denied rehearing on March 20, 2001. Mr. Hamwi appealed.

The Fourth District Court of Appeal in *Hamwi v. State*, 805 So.2d 101, 102 (Fla. 4th DCA January 23, 2002), reversed and remanded on ground two, (The suppression by the prosecution of favorable evidence, under *Brady v. Maryland),* and ordered the trial court to hold an evidentiary hearing on the matter.

An evidentiary hearing was held on March 10th, and 11th, 2003, where evidence and witnesses were presented in support of Mr. Hamwi's claim that the State violated his constitutional rights under the dictates

of *Brady v. Maryland, supra*, (Exhibit "C"). Mr. Hamwi filed a "Post-Hearing" brief on April 14, 2003, (Exhibit "D"), the State filed a Response on May 5, 2003 (Exhibit "E"), Mr. Hamwi filed a Reply to the State's Response (Exhibit "F").

The trial court Hon. Judge Susan Lebow denied the PCR Motion after the evidentiary proceedings by written order on January 16, 2004, citing as reason for denial:

> "Defendant has failed to show that the State suppressed favorable evidence of a fingerprint match between Beckett, Jr.'s standards and the latents from the crime scene. There was no match between Beckett, Jr. and any of the latents. Moreover, the memo referred to a comparison, not a match. The evidence at the hearing failed to establish that Ciotola had even compared Beckett, Jr.'s standards with the latents. Rather, the testimony at the hearing indicated that the information contained in the memo by Tony Loe about a five point comparison was erroneous and likely the result of a miscommunication or misunderstanding. As such, this Court finds that the Defendant has failed to establish that there was favorable evidence or a five point comparison or that the State suppressed favorable evidence of such a comparison."

(Exhibit "G").

Mr. Hamwi appealed.

THE FOURTH DISTRICT COURT OF APPEALS UNEXPLAINED AFFIRMANCE OF MR. HAMWI'S APPEAL

Mr. Hamwi filed his initial brief (Exhibit "H") arguing that he was entitled to a new trial based on the prejudice established from the State's Suppression of favorable evidence claims: The State of Florida filed an Answer Brief (Exhibit "I") and Hamwi filed a Reply Brief (Exhibit "J"), from which the Fourth District issued an order affirming the denial of Hamwi's appeal, *per curiam*, without a reasoned opinion their affirmation can be found at, *Hamwi v. State*, 913 So.2d 609 (Fla. 4th DCA November 2, 2005) (Table).

PROCEEDINGS BEFORE THE FEDERAL DISTRICT COURT

Mr. Hamwi filed his Amended Petition for Writ of Habeas Corpus and Supporting Memorandum in the United States District Court, Southern District of Florida, pursuant to 28 U.S.C. §2254 on June 9, 2006 making the following claims: (1) The exclusion of critical, relevant impeachment evidence, in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (2) The admission of hearsay statements of Mr. Hamwi's co-defendant in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (3) Failure to correct material false testimony and suppression by the prosecution of favorable evidence, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; (4) Failure to correct material false testimony, in violation of the due process clause of the

Constitution of the United States; (5) Suppression of Favorable evidence and failure to correct material false testimony, in violation of the due process clause of the Fourteenth Amendment; (6) Denial of the Effective Assistance of Counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution (Failed to call two witnesses who would testify that they saw the victim Mrs. Hamwi on the day she was supposed by have been murdered); (7) Denial of the Effective Assistance of Counsel in violation of the Sixth and Fourteenth Amendments to the Constitution (Failure to impeach Beckett, Sr.'s testimony); (8) Denial of Effective Assistance of Counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution (Failed to impeach Detective Bronson's testimony); and (9) Denial of the Effective Assistance of Counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution (Misadvise as to testify in his own behalf at trial). (Exhibit "K & L").

The District Court issued an Order to Show Cause (Exhibit "M") and the State responded on December 11, 2006. (Appendix "N"). Mr. Hamwi filed a Reply to the State's Response arguing: (I) Hamwi was denied his right to confront adverse witnesses at this trial; (II) State presented and/or failed to correct false testimony; (III) State Suppressed favorable evidence; and (IV) Hamwi was denied the effective assistance of counsel. (Appendix, Exhibit "O").

The Magistrate issued his Report and Recommendation (R & R) on November 15, 2007, recommending to the court that Mr. Hamwi's Petition

for Writ of Habeas Corpus should be denied and his Amended Request for Hearing be denied. (Exhibit "P"). Mr. Hamwi filed Objections to the Magistrate's R & R on November 26, 2007 arguing that the court deny the recommendations and grant hearing. (Exhibit "Q"). The State did not file a Response to Hamwi's Objections to the Magistrate' R & R.

Oral arguments were held before the District Court on January 16, 2008, the transcript of those arguments can be found at (Appendix, Exhibit "R").

On February 14, 2008, based on Judge Altonaga recommendation, the State filed it's Response to Petitioner's Objections to the Magistrate's R & R (Exhibit "S") and on March 3, 2008, Mr. Hamwi filed his Reply to the State's Response. (Exhibit "T").

The United States District Court, Judge Cecilia M. Altonaga, by written order on June 4, 2008 denied relief, which can be found at (Exhibit "U").

PROCEEDINGS BEFORE ELEVENTH CIRCUIT COURT OF APPEALS

Hamwi filed his Application for a Certificate of Appealability (COA) with the United States Court of Appeals for the Eleventh Circuit on June 25, 2008 in Case No. 08-13342-J. (Exhibit "V")

The Eleventh Circuit in an unpublished opinion denied the Certificate of Appealability reasoning that Mr. Hamwi has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). (Exhibit "W").

This Petition for Writ of Certiorari follows:

BRADY IMPLICATIONS

A Brady[10] violation occurs when the government fails to disclose evidence materially favorable to the accused. 373 U.S. at 87, 83 S.Ct. 1194. The United States Supreme Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is *known only to police investigators and not to the prosecutor. Kyles v. Whitley*, 514 U.S. 419, 435, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "[T]he individual Prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley, supra*, at 682, 105 S.Ct. 3375. Although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case is such a different light

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[10] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

as to undermine confidence in the verdict." *Id.*, at 435, 115 S.Ct. 1555.

In *Strickler, supra,* this court set out the three components or essential elements of a *Brady* prosecutorial claim: (1) that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) that prejudice must have ensued. 527 U.S., at 281-282, 119 S.Ct. 1936.

Mr. Hamwi clearly presented a federal constitutional *Brady* claim to the State Trial Court, (See Motion for Post Conviction Relief - Exhibit "E"); the State Appellate Court, (See Appellant's Initial Brief - Exhibit "N"); the Federal District Court, (See Amended Petition for Writ of Habeas Corpus - Exhibit "R"); and on Application for Certificate of Appealability, (See Application for COA - Exhibit "V"), where Mr. Hamwi's claim meets all three of the components that this court set forth as cause for reversal.

The only way this court can make an intelligent assessment of the prejudice Mr. Hamwi suffered due to the exclusion of the omitted *Brady* evidence, is for the Eleventh Circuit Court to issue a reasoned opinion as to the justification it used to deny Mr. Hamwi's Habeas Corpus Petition. *Youngblood v. West Virginia, supra.*

THE BROWARD COUNTY STATE ATTORNEY'S HISTORY OF INTENTIONAL EXCLUSION OF EXCULPATORY EVIDENCE

On February 20, 1976, Walter Norman Rhodes, (Rhodes) Jesse Joseph Tafero (Tafero) and Sonia Jacobs (Jacobs) were alleged to have murdered a Florida State Trooper, Phillip Black and his friend Donald Irwin, a visiting Canadian Law Enforcement Officer (Constable).

After their capture, during questioning, Rhodes accused Tafero and Jacobs of shooting the victims, Tafero accused Rhodes of being the shooter.

Rhodes agreed to testify against Tafero and Jacobs in exchange for a Life sentence. Tafero and Jacobs were tried separately, each were convicted and each were sentenced to death. Tafero, after exhaustion of all appeals was executed in Florida's Electric Chair

However, during Jacobs appellate process it was discovered, when Jacobs counsel requested a copy of the Pre-sentence Investigation (PSI) Report, that the Broward State Attorney's Office had hidden evidence of a confidential polygraph examination that had been administered to Rhodes, where the results of that examination severely differed from his trial testimony. The Florida Supreme Court ordered a hearing in the trial court to determine if the State Prosecutor violated *Brady v. Maryland* by not disclosing this critical information. The trial court found that the prosecution had not improperly withheld the polygraph report. The Florida Supreme Court affirmed the conviction but

reversed the death sentence, Jacobs was resentenced to two concurrent life sentences for the murders. *See Jacobs v. State,* 396 So.2d 713 (Fla. 1981).

On Petition for Writ of Habeas Corpus in the United States District Court Jacobs made several claims, including the State violated *Brady* by failing to reveal Rhodes' unreliable testimony, and that Jacobs cellmate Brenda Isham had perjured her testimony at Jacobs trial. The District Court denied habeas relief and Jacobs appealed to the Eleventh Circuit.

The Eleventh Circuit Court found it was reasonably probable that the exclusion of the polygraph report would have altered the outcome of the trial and that it satisfied the three prongs of the *Brady* test, thus Jacobs conviction was reversed and the case remanded for a new trial. *See Jacobs v. Singletary,* 952 F.2d 1282 (11th Cir. 1992).

Similarly, as reported in *Long v. Satz,* 181 F.3d 1275, 1277 (11th Cir. 1999), and cited above, the Broward State Attorney in prosecuting *this very case,* in 1985 withheld exculpatory information regarding the innocence of John Purvis, who subsequently served nine (9) years in prison because the State Attorney in their fervor to clear a high-profile case was willing to forgo an innocent man's constitutional rights in order to calm the public outcry from a exceptionally heinous crime involving the death of a young mother and her infant child.

Mr. Hamwi asserts that the Broward County State Attorney once again has seized the constitutional rights of an innocent man when they intentionally concealed

the knowledge that their star-witness' (Robert W. Beckett Sr.) testimony became unreliable when a Inter-Office Memorandum written by Assistant State Attorney Anthony Loe,[11] reported a fingerprint matching Beckett, Sr.'s son, (Robert W. Beckett, Jr.), was lifted from Mrs. Hamwi's home. The report of this finding was discovered when Mr. Hamwi's attorney, Mr. Scherker, filed for documents in the State Attorney's file and found the memo, which came to be known as the "Loe Memo," transmitted in October 1992 (prior to Mr. Hamwi's arrest and subsequent trial).

The Loe memo, originally written with regard to the state's case, *State of Florida v. John Gordon Purvis,* Case No. 84-25CF10A, which in pertinent part relates to the search for latent fingerprints belonging to Robert W. Beckett, Senior & Junior, who had never previously been suspects in the case. The finding by Examiner Carl Ciotola and Investigator Tim Bronson that one of the latent cards lifted from the scene of the Hamwi murder matched a partial latent print provided by the California Department of Corrections, to Beckett, Jr., was critical in the State's subsequent investigation that cleared John Purvis of the crime and initiated the investigation that led to the indictment and arrest of Mr. Hamwi and Paul Serio: (Exhibit "X").

> On October 12, 1992, at approximately 9:20 AM, I received the fingerprint cards from the

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[11] W. Anthony Loe is an Assistant State Attorney in charge of the State Attorney's Office in the Seventeenth Judicial Circuit, in and for Broward County, Florida.

> Los Angeles County Sheriff's Office.[12] The print cards were forwarded to the Fort Lauderdale Police Department for comparison with the latents that were lifted from the crime scene.
>
> The afternoon of October 12, 1992, I made arrangements for Tim Bronson and Carl Ciotola (FLPD latent print examiner) to meet with Dallas the following morning. The three of them were to then go to the Clerk's evidence locker on Hillsborough Boulevard so that Carl could compare the latent prints in this case with the standards.
>
> The afternoon of October 13, 1992, I received a call from Tim Bronson. He informed me that Carl had made a 5-point comparison with one of the latents and one of Robert Beckett Jr.'s fingerprints. Unfortunately, the standard print was not rolled completely. Tim called Folson prison in California, where Beckett, Jr. is incarcerated, to have his prints rolled again. I conveyed this information to Michael J. Satz and Ralph J. Ray, Jr.

Mysteriously, the fingerprint cards that Anthony Loe speaks of in the memorandum disappeared and could not be used to substantiate Mr. Hamwi's claim at latter evidentiary proceedings, including the evidentiary hearing held in the trial court (Appendix, Exhibit "I"),

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12 The fingerprint cards being referred to were of Robert Wayne Beckett, Sr. and his son Robert Wayne Beckett, Jr.

or the hearing held in the U.S. District Court on January 16th 2008. (Appendix, Exhibit "S"). Hamwi asserts that this evidence was tampered with much like the evidence in John Purvis' case, where the prosecutor told the investigator to disregard the memo.

Thus, Mr. Hamwi's claim not only encompasses the concealment of the latent fingerprint match that the Loe memo suggests, it also includes the concealment of the *memo itself.* Where had the defense team known of the memo, prior to trial, Mr. Hamwi had the resources to conduct his own investigation regarding Beckett, Jr.'s possible involvement in the murder thereby discrediting Beckett, Sr.'s testimony and exclusion of Mr. Hamwi as a suspect in the crime.

The state and federal court's below have misconstrued the importance of the concealment of the "Loe Memorandum" from the onset. The rulings denying relief wrongly conclude that there was no materiality or prejudice because the fingerprint that the memo references did not exist. However, this analogy is inconceivable where it has never been proven that this assertion is true.

Testimony by State and Defense witness conflict as to the fingerprint's existence, however the real issue here, is that the State hid the fact that the possibility existed that such a print existed, by concealing the "memo" itself. This is the *Brady* violation, the concealment of a material piece of evidence that could have yielded a defensible issue that precluded Hamwi from receiving a fair trial.

The evidence would have also allowed further investigation into Robert W. Beckett, Sr.'s testimony as a test to its reliability.

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND REMAINS IMPRISONED BASED ON AN ADJUDICATION AND SENTENCE THAT WAS ILLEGALLY OBTAINED BY SUPPRESSION OF EVIDENCE THAT WAS BOTH IMPEACHING AND EXCULPATORY, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND *BRADY V. MARYLAND, SUPRA.*

Elliot Scherker, Esquire, represented Mr. Hamwi during all post conviction proceedings in this case. It was through Mr. Scherker's efforts that it was discovered, upon filing a records request under the Public Information Act, that the State of Florida had concealed evidence, of a memorandum written by a State Attorney, that if known at the time of Mr. Hamwi's trial, would have given the defense an opportunity to discredit the testimony of the State's star witness, Robert W. Beckett, Sr., where the concealed memorandum alluding to scientific evidence, revealed that an unexplained

latent fingerprint, matching Robert W. Beckett, Jr., was found at Mrs. Hamwi's home, the scene of the murder.

The testimony of Beckett, Sr. was that he had been hired by Mr. Hamwi for a $14,000 fee, to kill his ex-wife, and that Beckett, Sr. along with Paul Serio, had committed the crime alone. If this was the case, then the memo referring to the unexplained fingerprint would have given the defense the opportunity to discredit Beckett, Sr.'s statements, and allowed the jury to decide the trustworthiness of Beckett's testimony.

The District Court at the Evidentiary hearing, held January 16, 2008, heard Mr. Scherker explain that the State knew about this evidence prior to Mr. Hamwi's trial, but did everything humanly possible to conceal it from the defense.

This was not something new for the State to accomplish in this case. They had already convicted one innocent man, John Purvis, through the use of deceptive police practices and concealed evidence. Where State Prosecutor's had known of Robert Beckett's involvement in the Hamwi murder, prior to Purvis' direct appeal in *1985*, however, Prosecutor's Ralph Ray and Robert Carney instructed the State's Investigator Barbara Barton to disregard that evidence and close the investigation. *See Long v. Satz*, 181 F.3d 1275, 1277 (11th Cir. 1999).

Furthermore, prior to Hamwi and Serio's joint trial, Serio's counsel filed a request that Emma Jo Bartlett, a listed prosecution witness and mother of John Purvis, submit to extraction of hair samples and fingerprinting

because Mr. Serio asserted that the crime scene was substantially changed after the crime had been committed and that there were numerous *unmatched fingerprints* and hairs found at the scene. Mr. Serio argued that someone may have altered the crime scene after the murder and that Ms. Bartlett may have been the one who made those alterations. The Circuit Court agreed and granted Serio's request, Emma Jo Bartlett appealed. *See Bartlett v. Hamwi*, 626 So.2d 1040, 1041, 1042-43 (Fla. 4th DCA 1993). The Fourth District granted certiorari, and quashed the Circuit Court's order requiring Ms. Bartlett submit to testing.

Therefore, the subsequent report of the finding of a fingerprint belonging to Robert W. Beckett, Jr., becomes a question for the jury to decide, whether Beckett, Sr. was being truthful regarding his participation in the crime, and whether Beckett, Sr., was being truthful about Mr. Hamwi's participation as the instigator of the crime.

What may be forgotten here, is that the Beckett's had committed a prior murder "together," in 1981 (California) when Beckett, Sr., after being jilted by an ex-girlfriend, instructed Beckett, Jr., to go out and find a girl and bring her to him so that he could rape and murder her. Beckett, Jr. met Tracy Lea Stewart on August 9, 1981 and brought her home after a date. Together, Beckett, Sr. and Jr. raped and murdered her, much in the same fashion as Mrs. Hamwi was murdered.[13]

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[13] Beckett reportedly raped Stewart, then bludgeoned, strangled and stabbed her. Beckett, testified that he hit

(Cont'd)

Beckett, Sr. met Mrs. Hamwi while she was married to and lived with Mr. Hamwi in Colorado. Mrs. Hamwi recognized Beckett Sr., when he arrived at her font door, and it was this recognition that allowed him to gain access to her home the day of the crime.

It was well known that Beckett, Sr. and Paul Serio were "play-actors," who lived in a fantasy world. They belonged to the "Society for the Creative Anachronism" (SCA), they traveled to and participated in SCA activities and Serio was known as an outrageous liar, who made claims of being a mob hit-man and that he played putt-putt golf with the Pope.

In 1988 when Beckett Jr. was confronted with the Tracy Stewart murder, he decided to take the blame and let his father off the hook, because Beckett, Sr. was dying. Beckett, Sr. when confronted with the Hamwi murder, decided to confess, and implicate Mr. Hamwi, letting Beckett, Jr. off the hook.[14]

(Cont'd)

Mrs. Hamwi in the head, strangled and stabbed her. (This testimony was refuted by the Medical Examiner, who testified that the body had no sign of trauma to the head, had not been strangled, and the cause of death was the knife wound to the chest, which pierced the heart.)

[14] During interviews with Robert Beckett, Jr., it was found that his description of the events and details of the crime scene were more accurate than those of Beckett, Sr. His knowledge of certain aspects of the crime and how it was committed, were more exact, where Beckett, Sr.'s were contrived. This would also tend to support the theory that Beckett, Sr.'s testimony was fabricated and perhaps he was not even at the scene of the crime. The murder was committed by someone else.

Beckett, implication of Mr. Hamwi as the reason he sought out and murdered Mrs. Hamwi was because Mr. Hamwi wanted relief from a large settlement with his ex-wife. This reasoning defies logic as the divorce had already been settled when Beckett killed Mrs. Hamwi, and Mr. Hamwi agreed to pay twelve-thousand ($12,000) dollars to Mrs. Hamwi and to pay five-hundred ($500) dollars a month in alimony and child support, certainly within Mr. Hamwi's means.

Why then would Hamwi spend $14,000 to release himself from a $12,000 obligation.[15]

Secondly, it makes no sense that Hamwi would continue to adjust (in 1984 and 1986), the payment schedule for the $5,500 loan that Beckett and his wife procured from the Hamwi's Corporation *after Beckett allegedly committed a contract killing,* even to the extent that the interest rate was increased to accommodate the late payments and Beckett's wife Cathy subjecting herself to clean Hamwi's company offices as partial repayment for the loan.

This Court has held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant; *a due process violation occurs whenever such evidence is withheld. Brady v. Maryland, supra,* also *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

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[15] During Hamwi's trial, Beckett, Sr., was asked by defense counsel how he spent the $14,000, an amount that Beckett said was more money than he had ever had before in his life, yet Beckett could not account for one penny of the $14,000 alleged payment.

Although the *Agurs* case is somewhat distinguishable from the situation here, because it became clear under the *Agurs* analogy, that a defendant's failure to *request* favorable evidence did not leave the Government free of all obligation.

There, the court distinguished three situations in which *a Brady* claim might arise;

First, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured; second, where the Government failed to accede to a defense request for disclosure of some *specific* kind of exculpatory evidence; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial. *Agurs, supra.*

The next application toward the present *Brady* purification was announced in *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). There, the court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e., the "specific-request" and "general or no-request" situation. *Bagley* held that regardless of the request, favorable evidence is material, and constitutional error results from its suppression by the government, *if there is reasonable*

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. 473 U.S. at 682, 105 S.Ct., at 3383.

Ergo, the question here is whether the undisclosed evidence (Memo) is material under *Brady* and if there exists a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Further, whether the District Court and Appellate Court's below unreasonably found that Hamwi's claims failed to rise to a Constitutional deprivation of rights.

Mr. Hamwi should have been issued a Certificate of Appealability to the extent that he demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issue presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

At least as to the application of Rule 15(b) this case surely fits that description. A COA should have issued.

What perhaps the courts below have failed to realize is that the *Brady* claim asserted here has two facets. The first facet being the concealment of the "Loe Memorandum," which could have led to further investigation into the participants of the crime. That, statements related by Beckett Sr., could have been examined for authenticity, and Beckett, Jr.'s testimony could have been important had it been developed sooner. By the time investigator's approached Beckett,

Jr. at Folsom prison in 1992, he had resigned himself to his posture and told them: "Your 4 years too late."

The second facet does not really matter. Because regardless of the fact of whether or not a latent print belonging to Beckett, Jr. was lifted from the scene of the crime, the damage was already done. The Broward State Attorney's Office knew as early as 1985 of Robert Beckett, Sr.'s involvement in this crime. They concealed it because they had a confessed murderer in prison and the Public outcry had subsided. Now again in 1992 their cover up came back to haunt them. The State Attorney had to make preparations for the second coming of John Purvis, who would want to be compensated for his wrongful conviction and sentence, followed by nine (9) years of wrongful incarceration. Hence, another innocent persons rights were on the line and again they chose to conceal evidence to Mr. Hamwi's detriment.

Hamwi asserts that he has shown the withheld evidence violated his right to the due process of law and prejudiced his case. It precluded (Memo) timely investigation of Beckett, Jr.'s participation and possible conflicting stories that may have led to the truth of what really happened and how Mrs. Hamwi ended up dead. Beckett's credibility would have been severely damaged to the point that no reasonable jury could rely on the truthfulness of his testimony, which would have swayed their decision to acquit instead of convict.

The decision of the United States District Court and Affirmed by the Eleventh Circuit Court of Appeals is contrary to United States Supreme Court decisions based on the same principle of law asserted above.

CONCLUSION

Mr. Hamwi has established that the omitted evidence, i.e., the "Loe Memorandum" reporting a fingerprint belonging to the confessed killer's son Robert Beckett, Jr. at the crime scene, would have severely discredited their star-witnesses testimony, meets the criteria that; the evidence at issue is favorable, because it is exculpatory and because it is impeaching; the evidence was known to the State and was suppressed, either willfully or inadvertently; and the Mr. Hamwi suffered prejudice by its omission.

Furthermore, Mr. Hamwi has shown that there is a reasonable probability that the result of the trial would have been different if the suppressed evidence had been disclosed to the defense. *Strickler, supra.* "The remedy of retrial for the State's suppression of evidence favorable to the defense is available when, 'the favorable evidence could reasonably be taken to put the whole case is such a different light as to undermine confidence in the verdict.'" *Taylor v. State,* 33 Fla.L.Weekly S410, S412 (Fla. June 19, 2008) (quoting *Kyles v. Whitley,* 514 U.S. 419, 435 (1995).

Mr. Hamwi's claim is derived from a deprivation of constitutional rights, which are debatable among jurists and are ripe for resolution.

The issues Hamwi presented for review in the federal courts are not complicated and can be demonstrated by a review of the record that is now before this Honorable Court. Therefore, based upon the

foregoing petition, it is respectfully requested that the Court grant a writ of certiorari and remand these proceedings to the United States Court of Appeals for the Eleventh Circuit for a return to the State trial court for a new trial to be commenced.

Respectfully submitted,

PAUL ROBERTS HAMWI
Petitioner, pro se
UNION CORRECTIONAL INSTITUTION
7819 N.W. 228th Street
Raiford, Florida 32026-4210

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR A CERTIFICATE OF APPEALABILITY FILED SEPTEMBER 12, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13342-J

PAUL ROBERTS HAMWI,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Walter A. McNeil,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S REPORT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ENTERED JUNE 4, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-6731-CIV-ALTONAGA/Turnoff

PAUL ROBERTS HAMWI,

Petitioner,

vs.

JAMES MCDONOUGH, Secretary, Florida Department of Corrections,

Respondent.

ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S REPORT

On June 9, 2006, Petitioner, Paul Roberts Hamwi ("Hamwi"), filed an Amended Petition for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. §§ 2241 and 2254. Petitioner challenges the constitutionality of his conviction of first degree murder, following a jury trial. This matter was referred to Magistrate Judge William C. Turnoff on June 26, 2006. Upon review of the parties' written submissions and argument held on June 12, 2007, Magistrate Judge Turnoff issued a Report

[D.E. 61], recommending that the Petition and Hamwi's request for a hearing be denied. The undersigned has carefully considered the Report, the record and the parties' written submissions, and the oral arguments presented at a hearing held on January 16, 2008.

I. Procedural History

In 1983, Petitioner, along with co-defendant, Paul Michael Serio,[1] was indicted on two counts of the first degree murder of Petitioner's former wife, Susan Hamwi, and their eighteen month young child, Shane Hamwi. (*See Respondent's Resp. to Order to Show Cause, p.* 1) (citing [D.E. 38], Vol. 1, Tab 1). After a trial that lasted approximately ten weeks, from January 27 through March 23, 1994, the jury found Petitioner guilty of the charge of first degree murder of his former wife. *(See id.* at 1-2) (citing [D.E. 17]; [D.E. 19], Vol. 2, Tab 106). He was acquitted of the charge of first degree murder of his daughter. The trial court followed the jury's sentencing recommendation and sentenced Petitioner to life in prison. *(See id. at* 2) (citing [D.E. 19], Vol. 2, Tab 119).

Petitioner appealed his conviction and sentence to the Florida Fourth District Court ofAppeal. The conviction and sentence were affirmed in a per curiam

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1. The record contains various spellings for this individual's name, e.g., "Cerio," "Schiro," and "Schirio." In this Order, Paul Michael Serio or Serio is referred to as the suspect and co-defendant in the underlying murder trial.

opinion entered on October 9, 1996. *See Hamwi v. State of Florida*, 681 So.2d 291 (Fla. 4th DCA 1996). Petitioner did not seek further review from the Florida Supreme Court nor did he file a certiorari petition with the United States Supreme Court. Thus, the conviction and sentence became final on January 7, 1997.

On May 7, 1997, Petitioner filed a Motion to Correct Illegal Sentence pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure, challenging restitution ordered. (*See Respondent's Resp. to Order to Show Cause*, p. 1) (citing Respondent's Exhibit "A"). The trial court denied the motion on July 17, 1997. (*See id.*) (citing Respondent's Exhibit "B"). Hamwi appealed the denial to the Florida Fourth District Court ofAppeal. Thereafter, Petitioner's voluntary dismissal was granted and the appeal was dismissed on June 23, 1998. (*See id.*) (citing Respondent's Exhibit "C").

Petitioner filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on January 5, 1998, raising seven grounds for relief. (*See id.* at 3) (citing [D.E. 20], Vol. 3, Tab 127). On September 15, 2000, the trial court denied Petitioner's motion for post-conviction relief. (*See id.*) (citing [D.E. 23], Vol. 6, Tab 152). On September 19, 2000, Petitioner filed a motion to amend his motion for post-conviction relief and requested a rehearing on the claims rejected in the September 15, 2000 Order. The trial court denied the motion for rehearing and to amend on March 21, 2001. (*See id.* (citing [D.E. 24], Vol. 7, Tab 163).

Appendix B

Petitioner appealed the order denying post-conviction relief to the Florida Fourth District Court of Appeal. In an opinion issued on January 23, 2002, that court affirmed the trial court's summary denial of all claims, except for denial of the first ground for relief, a *Brady*[2] violation regarding the suppression of fingerprint evidence, and remanded the case to the trial court for an evidentiary hearing. *See Hamwi v. State of Florida*, 805 So.2d 101 (Fla. 4th DCA 2002).

Pursuant to the appellate court's mandate, an evidentiary hearing was held on March 10 and 11, 2003. (*See Respondent's Resp. to Order to Show Cause*, p. 4) (citing [D.E. 27], Vol. 10, Tabs 195 & 196). The trial court filed its order denying the motion for post-conviction relief on January 16, 2004. (*See id.*) (citing [D.E. 27], Vol. 10, Tab 192). Petitioner appealed that order to the Fourth District Court of Appeal. The appellate court issued a per curiam affirmance on November 2, 2005. *See Hamwi v. State of Florida*, 913 So.2d 609 (Fla. 4th DCA 2005). *(See Respondent's Resp. to Order to Show Cause*, p. 4) (citing [D.E. 27], Vol. 10, Tab 200).

Petitioner filed the present action on May 2, 2001. On the same date, however, Petitioner moved to abate the proceedings. On February 27, 2002, Magistrate Judge Frank J. Lynch entered a Report recommending that the Petition be denied pending exhaustion of all state remedies. (*See [D.E. 9]*). The Court[3] adopted the

2. *Brady v. Maryland*, 373 U.S. 83 (1963).

3. The Honorable Wilkie D. Ferguson.

Magistrate Judge's recommendations and denied the Petition. That order was later vacated, and Petitioner's Motion to Abate was granted on March 20, 2002, pending exhaustion of state remedies on all claims. (*See* [D.E. 12]).

On June 9, 2006, Petitioner filed a Motion to Administratively Re-Open Case, which was granted on June 14, 2006. (*See* [D.E. 32]). Petitioner also filed an Amended Petition for Writ of Habeas Corpus. The memorandum in support of the Amended Petition was filed on July 3, 2006. (*See* [D.E. 14 & 35]). On March 21, 2007, Petitioner filed a Request for a Hearing and subsequently, an amended request. A non-evidentiary hearing was held before Magistrate Judge Turnoff on June 12, 2007, following which, as stated, the Report was issued.

On November 26, 2007, Petitioner filed a Request for Hearing on the Magistrate Judge's Report and Recommendation. The Court granted Petitioner's request and a hearing was held on January 16, 2008. On the same day, Respondent was ordered by the Court to submit a response to Petitioner's Objections to the Magistrate Judge's Report and Recommendations by February 15, 2008. Petitioner was permitted to file a Reply by March 7, 2008.

Appendix B

II. Factual Background

The following is a factual summary generated from the materials contained in the record.[4] The Court focuses on the relevant events that are the subject of the Amended Petition.

A. *The Hamwi marriage and divorce*

Petitioner married Susan Bolender (Hamwi) on October 26, 1981. At the time, they were living in Colorado and she was pregnant. The couple executed a prenuptial agreement. Within a month of their marriage, they separated and began living apart.

On May 12, 1982, Mrs. Hamwi gave birth to a daughter, Shane Hamwi, and in September, Petitioner filed for divorce. The divorce was not an amicable one. On June 29, 1983, a Colorado court issued a divorce decree and declared the prenuptial agreement void. According to the Colorado court, Petitioner, "ha[d] been less than candid about his assets and income." (*See* [D.E. 27], App. Vol. 10, Tab 213). The court ordered Petitioner to pay the following: (a) $12,157.81 for Mrs. Hamwi's attorney's fees; (b) $12,000 to Mrs. Hamwi for disposition

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4. The undersigned incorporates the Factual Background included in the Magistrate Judge's Report and Recommendation. The Record includes the state court files that have been docketed as fourteen volume appendices to the Amended Petition. (*See* [D.E. 18-31]). These files contain, *inter alia*, the transcripts of the trial proceedings, (1/27/94-3/23/94), and the sentencing proceedings (6/10-07, 6/24/07 & 7/1/94).

of the marital property; (c) $500 per month in spousal maintenance until their daughter Shane entered the first grade; (d) $500 per month in child support until Shane reached the age of majority or until her death or emancipation. (*See id.*). Petitioner sought a new trial.

Thereafter, in August 1983, Susan Hamwi moved to Fort Lauderdale, Florida. On September 7, 1983, the Colorado court denied Petitioner's motion for a new trial. The following day, Susan Hamwi obtained a contempt order against Petitioner for failure to pay support. The contempt order was served in open court that very day. (*See id.* at Tab 216). A show cause hearing as to Mrs. Hamwi's motion for contempt was scheduled for October 18, 1983 (*see id.*), but was rescheduled due to Petitioner's illness. On October 31, 1998, Susan Hamwi filed a Motion to Enforce Contempt Order. That motion was never heard.

B. *The Hamwi murders*

Susan and Shane Hamwi were found dead in their Fort Lauderdale home on November 8, 1983. Susan Hamwi was found lying on the kitchen floor with a knife blade on her chest and the broken handle of the knife on the floor next to her body. There were two stab wounds to her chest, one of which was a fatal blow to her heart. The kitchen telephone cord was wrapped around her neck. It was determined that Shane Hamwi, who was eighteen months old at the time, died from neglect sometime after her mother was killed.

Appendix B

In March 1985, John Purvis, a schizophrenic neighbor of Mrs. Hamwi who was seen near her home on November 3, 1983, was convicted of the murders. His conviction was upheld on appeal in 1987, and was affirmed by the Eleventh Circuit Court of Appeal in 1991. Certiorari was denied by the U.S. Supreme Court in 1992.

On October 1, 1992, Purvis' counsel began an investigation and demanded records from the Fort Lauderdale Police Department. Detective Timothy Bronson ("Bronson") was assigned to respond to the request. The reopening of the case and subsequent investigations led to Purvis' exoneration in 1993.

C. *The Becketts*

On October 9, 1992, Bronson began investigating Robert Beckett, Sr. ("Beckett, Sr.") in relation to the Hamwi murders. Beckett, Sr. had visited Colorado prior to the murders and moved to live permanently in Colorado at some point after the murders. Beckett, Sr. had been a suspect in the 1981 California murder of a woman, Tracy Stewart. The record suggests that Beckett, Sr. persuaded his son, Robert Beckett, Jr. ("Beckett, Jr."), to help him find a woman to rape and murder ("thrill killing").[5] Beckett, Jr. confessed to the Stewart murder in 1987 leading to both Becketts being

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5. Details of the Stewart murder are provided in the Amended Petition. *(See Mem. of Law in Support of Amend. Pet.* [D.E. 35], pp. 14-15).

first charged in 1988. However, the younger Beckett refused to testify against his father, forcing the prosecution to drop the charges six months later. Beckett, Jr. was ultimately convicted and is serving a life sentence.[6]

On or about October 18, 1992, Bronson visited Aspen, Colorado and met with a local detective, Gary White ("White"), who had previously provided the Fort Lauderdale Police Department with information on Beckett, Sr. White provided Bronson with information, fingerprint cards, and old notes relating to Beckett, Sr.

On November 17, 1992, Bronson called Beckett, Sr. The trial testimony regarding the telephone conversation is inconsistent. According to Bronson, he told Beckett, Sr. he was investigating the Hamwi murders, but did not specifically mention Paul Hamwi. Beckett, Sr. later testified during Hamwi's trial, stating that he did not know what Bronson was talking about until the name Paul Hamwi was mentioned. During this time, Bronson told Beckett, Sr. that he wanted to obtain his palm print. Bronson informed Becket, Sr. that someone from the Las Vegas Police Department could travel to Beckett, Sr.'s house and take his palm print.

On November 23, 1992, Bronson called Beckett, Sr. a second time, but was told to call his lawyer instead.

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6. On October 12, 1993, just before the commencement of Petitioner's trial, Beckett, Sr. was indicted for the Stewart murder.

Bronson called Beckett, Sr. a third time. According to Beckett, Sr. during this conversation the possibility of immunity was raised for the first time. Bronson called a fourth time, on December 7, 1992. According to Bronson, it was during this call that the issue of immunity was first raised. As noted in the Magistrate Judge's Report, the record is not clear on exactly what was known or suspected by law enforcement at that time. Bronson testified that during the December 7, 1992 call, at the point when Beckett, Sr. told him he would tell Bronson everything that had happened regarding the Hamwi murders if he received immunity, it was clear to Bronson they had the wrong man (John Purvis) in jail.

Bronson testified that he, along with then-Chief Assistant State Attorney Ralph Ray and then-Assistant State Attorney Anthony Loe, decided to grant Beckett, Sr. full immunity on December 8, 1992. According to Bronson, the decision was made because the case was otherwise at a dead end. Bronson further testified during Hamwi's trial that an individual identified as Paul Michael Serio was his prime suspect at the time.

On December 14, 1992, Bronson, Ray, and Beckett, Sr. executed a transactional immunity contract. Bronson testified he never asked for a pre-immunity proffer of testimony from Beckett, Sr. and that he was surprised when Beckett, Sr. admitted that he (Beckett, Sr.) had killed Susan Hamwi at Petitioner's request, and that Serio was his accomplice.

Appendix B

On December 22, 1992, Beckett, Sr. agreed to make several telephone calls to Petitioner, in an attempt to elicit incriminating information about the murders. (*See* [D.E. 20], App. Vol. 3, Tab 125(3)). During the conversations, Beckett, Sr. claimed he "got some people down my neck here in Florida" and "they are re-opening it all over me." (*Id.*). During these calls, Beckett, Sr. claimed he needed Petitioner's help and mentioned "doing a number on Susan for you," and "I killed her for you." (*Id.*). During this conversation, Hamwi responded, "I don't know what you are talking about," while at the same time making repeating offers of assistance to Beckett, Sr., such as "I can wire you money somewheres[sic]." (*Id.*). Hamwi also blamed Beckett, Sr.'s situation on Beckett, Jr. and Detective White, stating "your buddy . . . that cop . . . had it in so much for you here." (*Id.*).

On January 12, 1993, Petitioner was charged by a grand jury in Broward County, Florida, with two counts of murder in the first degree for killing Susan Hamwi and Shane Hamwi. Petitioner was tried jointly with Serio, who had confessed to being an accomplice to the murders. Beckett, Sr. testified he killed Susan Hamwi on or about November 1, 1983, in Fort Lauderdale, Florida and that Serio had been his accomplice.

At trial, the State's theory was that this was a "murder for hire" killing, and that Petitioner hired Beckett, Sr. to kill his wife in order to avoid paying child support and alimony. Petitioner's theory of defense was that Beckett, Sr., knowing how upset Petitioner was

about having to pay alimony and support payments, took it upon himself to kill Mrs. Hamwi in an attempt to ingratiate himself with Petitioner.

On June 24, 1994 Petitioner was convicted of the first-degree murder of Susan Hamwi and acquitted as to the charge involving his daughter, Shane Hamwi. He was subsequently sentenced to life imprisonment. Petitioner remains in the custody of the State of Florida.

III. Petitioner's Claims

The Amended Petition lists nine claims with numerous subparts. Petitioner's claims are summarized as follows:

(1) *Confrontation Clause Violation:* Petitioner claims his constitutional right to confront an adverse witness at trial was violated by the state court's exclusion of critical impeachment evidence and admission of hearsay statements.

(2) *Government's Use of Perjured Testimony:* Petitioner claims the state prosecutor knowingly presented false evidence by eliciting false testimony and providing false corroboration of a material witness's testimony.

(3) *Brady Violation:* Petitioner claims the State suppressed favorable evidence by not producing memoranda that could have potentially impeached critical witness testimony.

(4) *Ineffective Assistance of Counsel in Violation of the Sixth Amendment:* Petitioner claims he received ineffective assistance of counsel because trial counsel failed to, *inter alia:* (a) call favorable witnesses, (b) properly impeach two critical state witnesses, and (c) call Petitioner in his own defense.

IV. Standard of Review

The Court reviews the case *de novo. See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Additionally, the Court "may accept, reject or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b).

Claims brought pursuant 28 U.S.C. § 2254 are not cognizable on federal habeas corpus review unless they were first presented to the state courts and are thereby "exhausted." *Anderson v. Harless*, 459 U.S. 4, 6-8 (1982). A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254; *see also Williams v. Taylor*, 529 U.S. 362, 376 & 386 (2000).

Appendix B

In the context of habeas petitions, clearly established federal law refers to holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision. *Hall v. Head*, 310 F.3d 683, 691(11th Cir. 2002) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state court's summary rejection of a federal constitutional issue qualifies as an adjudication on the merits under 28 U.S.C. § 2254(d) that is entitled to deference. *See Wright v. Sec. for Dept. of Corrections*, 278 F.3d. 1245, 1253-54 (11th Cir. 2002) ("[T]he summary nature of a state court's decision does not lessen the deference that is due.") (citing cases); *see also Parker v. Sec. for Dept. of Corrections*, 331 F.3d 764, 776 (11th Cir. 2002) ("All that is required under § 2254(d)(1) is an adjudication on the merits, not a full state court opinion.") (citing *Wright*, 278 F.3d at 1254).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the presumption of correctness traditionally accorded to state court findings of fact in federal habeas corpus proceedings has been strengthened. The deference which federal courts are required to pay state court factual determinations under Section 2254(e)(1) is now mandatory even where no state evidentiary hearing was held on the issue. *See Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000); *Outten v. Kearney*, 2002 WL 531328, *2 (D. Del. March 28, 2002) ("[I]f the state court's finding is supported by the record, even though not by a 'hearing on the merits of the factual issue,' then it is presumed to be correct" under § 2254(e).) (quoting *Mendiola*, 224 F.3d

at 592-93). Under the AEDPA, "state court factual determinations are presumed correct and a federal habeas petitioner is stuck with them unless he can rebut their presumed correctness with clear and convincing evidence to the contrary." *Hunter v. Sec. for Dept. of Corrections*, 395 F.3d 1196, 1200 (11th Cir. 2005).

As noted by the Magistrate Judge in his Report, Petitioner is not entitled to relief unless he can demonstrate that his factual allegations, if proven, would indicate the state courts acted contrary to, or unreasonably applied, clearly established federal law when they rejected his claims. The claims presented in the Amended Petition have been properly presented and exhausted before the state courts. Further, the Petition is timely. (*See Respondent's Response* [D.E. 38], pp. 5-7).

V. Analysis

The undersigned addresses each of Petitioner's claims in turn.

Claim I: Confrontation Clause Violation

According to Petitioner, he was denied the right to effectively confront and cross-examine adverse witnesses at trial. Petitioner argues that the state court's limitation of the cross-examination of Detective Bronson and Beckett, Sr. violated established United

States Supreme Court precedent under the Confrontation Clause.[7]

"The Confrontation Clause guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of witnesses for the prosecution." *See United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1370 (11th Cir. 1994) (citations omitted). A defendant's rights under the Confrontation Clause are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of a witness and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable. *See id.* at 1371 (citing *United States v. Bennett,* 928 F.2d 1548, 1554 (11th Cir. 1991)). After that point, any further questioning is at the discretion of the trial court. *See United States v. Diaz,* 26 F.3d 1533, 1539 (11th Cir. 1994) (citing *United States v. Taylor,* 17 F.3d 333, 340-41 (11th Cir. 1994)). Further, in the context of habeas petitions, federal relief is not available to retry state issues. *See Estelle v. McGuire,* 502 U.S. 62, 68 (1991).

In this context, whether the exclusion of evidence is of constitutional dimension depends on the trial court's reason for the exclusion and the effect of the exclusion. When determining whether the exclusion of evidence

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7. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. AMEND. VI.

violates a defendant's confrontation rights, the Supreme Court has identified the following factors for a reviewing court to consider: (1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of a witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the strength of the prosecution's overall case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Before a reviewing court may grant relief on the basis of a violation of the Confrontation Clause, the court is required to apply a harmless error analysis. *See United States v. Stewart*, 93 F.3d 189, 194 (5th Cir. 1996) ("'The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.'") (quoting *Van Arsdall*, 475 U.S. at 684). *See also Nixon v. Epps*, 405 F.3d 318, 329 n.13 (5th Cir. 2005) (noting that a federal court must "use the more lenient *Brecht*[8] review, regardless whether the state court ever conducted a harmless error analysis") (citations omitted). Habeas relief based on an erroneous state court evidentiary ruling may be granted by a federal court "only if the ruling violates a specific federal constitutional right or is so egregious that it renders the petitioner's trial fundamentally unfair." *Brown v. Dretke*, 419 F.3d 365,

8. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

376 (5th Cir. 2005) (citing *Wilkerson v. Cain*, 233 F.3d 886, 890 (5th Cir. 2000); *Castillo v. Johnson*, 141 F.3d 218, 224 (5th Cir. 1998)).

Exclusion of Impeachment Evidence Involving Bronson

Petitioner claims the state court erred when it precluded Petitioner's counsel from cross-examining Detective Bronson regarding the Tracy Stewart murder in California and Beckett, Sr.'s involvement in that murder. Petitioner asserts that evidence with respect to Beckett, Sr.'s involvement with the Stewart murder was "crucial to Hamwi's attack on Bronson's credibility." (*Petitioner's Obj. to Report*, p. 26). Petitioner explains that

> proving that Bronson had been fully aware [of] Beckett's murder of Tracy Stewart – at the time the prosecution team decided to grant immunity to Beckett – would severely have damaged the state's careful construction of its justification for granting immunity to Beckett. That evidence would readily have shown a very different picture of the state's investigation: driven by outside pressures and the impending television documentary on the Purvis conviction, the prosecutors and police made an ill-advised decision to immunize Beckett, despite having good reason to believe that he killed Mrs. Hamwi.

(*Id.* at 27). Petitioner argues that details of the Stewart murder would have diminished Bronson's credibility on one critical point identified by the state, that is, Bronson's denial that he had mentioned Hamwi's name during his pre-immunity telephone conversation with Beckett.

According to Petitioner, if his counsel had been permitted to elicit from Bronson the gruesome details of the California murder, the jury would have, at the very least, questioned Bronson's claim that he had no reason to suspect Beckett, Sr. was the "hands-on killer" of Mrs. Hamwi. Petitioner concludes, "with Bronson's credibility thus critically impaired, the jury would have had good reason to question the truth of [Bronson's] testimony that he had not provided Beckett with Hamwi's name." (*Id.*).

The state court ruled the facts surrounding the Stewart murder in California were inadmissible because the California crime was not substantially similar to the Hamwi murder, and the evidence otherwise failed to meet the requirements of admissibility under Sections § 90.404(a) and (b) of the Florida Statutes. The court determined such evidence constituted impermissible propensity and character evidence. (*See* [D.E.17], T: 8946-47). Thus, the court limited the testimony regarding the California murder to: (1) the fact that Beckett, Sr. was charged with rape and murder; (2) the fact that the charges were later dismissed against Beckett, Sr. when Beckett, Jr. refused to testify against his father; and (3) the fact that the case was still open

when Beckett, Sr. was questioned by Bronson – prior to the grant of immunity.

As the Magistrate Judge noted in his Report, Bronson admitted that when he called Beckett, Sr. in October of 1992, the police and the State Attorney's Office already knew that Beckett, Sr. was a suspect in the California murder. Bronson did not review the California murder records prior to granting Beckett, Sr. immunity, even though he knew Beckett, Sr. had been arrested for that murder. (*See id.*, T: 3934, 4082- 84). During cross-examination Bronson further admitted that Beckett, Sr. had been offered immunity prior to providing a proffer letter, or any indication, of what Beckett Sr.'s testimony would be.

The undersigned agrees with the Magistrate Judge's determination that the record is clear as to what Bronson knew and what he did with such information at each stage of the investigation. While Petitioner was not permitted to pursue the line of questioning he proposes, the jury heard testimony regarding Bronson's knowledge that Beckett, Sr. was a suspect in the California murder. "[T]he Confrontation Clause only 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective on whatever way, and to whatever extent, the defense might wish.'" *Dorsey v. Chapman*, 262 F.3d 1181, 1188 (11th Cir. 2001) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original)). Petitioner's counsel sufficiently cross-examined Bronson in all relevant areas. Petitioner has failed to demonstrate how the state

court's limitation with respect to details of the California murder impaired Petitioner's ability to effectively challenge the reliability of Bronson's testimony that Bronson had no reason to believe that Beckett, Sr. was the hands-on killer before immunity was offered. The Court is not persuaded that the state court's decision to prevent the presentation of the details of the California murder prevented Petitioner from effectively challenging Bronson's credibility in this respect.

Exclusion of Impeachment Evidence Involving Beckett, Sr.

Petitioner makes similar arguments regarding the cross-examination of Beckett, Sr. permitted by the state court. Petitioner claims the state court's decision not to allow details of the Tracy Stewart murder to be presented to the jury was prejudicial. Petitioner contends he was further prejudiced when the prosecutor was allowed to elicit, during Beckett, Sr.'s direct examination, that while he was then under indictment for the Stewart murder, Beckett, Sr. had previously been charged in 1988 with the same crime and the 1988 charge had been dismissed. Petitioner asserts providing that information and excluding the gruesome details of the California murder during Beckett, Sr.'s cross-examination left the jury with the false impression that there was no merit to the California charges. Thus, Petitioner concludes, the limitations on Beckett, Sr.'s cross-examination also violated Petitioner's rights under the Confrontation Clause.

Appendix B

Contrary to Petitioner's contentions, defense counsel was able to sufficiently cross-examine Beckett, Sr. and the trial court's decision to limit testimony regarding the California murder did not violate Petitioner's rights under the Confrontation Clause. Petitioner was allowed to elicit that Beckett, Sr. was given immunity and that he was charged with another murder in California. Defense counsel's questioning gave jurors sufficient information in order to evaluate Beckett, Sr.'s reliability and truthfulness. The record indicates Beckett, Sr. was not portrayed during trial as a law abiding and pleasant individual. Indeed, in opening statement, the prosecutor stated:

> The evidence is going to show that Robert Wayne Becekett, Sr. is a cold-blooded murderer.
>
> * * *
>
> Now, Mr. Beckett is charged with murder in California. He's charged in a murder in California for which he was also charged in 1988.

([D.E. 17], T: 1879-1898). The same theme was presented by the defense:

> . . . Robert Wayne Beckett . . . [is] awaiting trial in California for the murder of another woman. Now he's under the gun more than ever to try and work out the deal, not only to

> escape Florida's electric chair as he had done, but now to try to escape California's gas chamber.
>
> The evidence will show in this case that in 1987 Robert Beckett, Sr.'s son was arrested for the murder of Tracy Lea Stewart in August the 9th 1981 and that shortly subsequent thereto he rolled on his father who was arrested for that offense and that his father spent time in jail on the word of his own son, until [the] son wouldn't testify and he was released in 1988.

(*Id.* at T: 1917-1918, 1947). Consistent with this theme, Beckett, Sr. was asked the following questions during his cross-examination:

> Q. Now, you are apparently charged in the State of California, are you not?
>
> A. Yes.
>
> Q. And what crime or crimes are you being charged with?
>
> A. Homicide.
>
> Q. And had you previously been charged with that same crime?
>
> A. Yes.

Q. An when was that?

A. 1988.

Q. And you were arrested?

A. Yes.

(*Id.* at T: 4494-95). In light of the record, the Court is not persuaded by Petitioner's argument that the state court's decision to limit testimony regarding the California murder left the jury with the false impression that there was no merit to the California charges. Consequently, Petitioner's Confrontation Clause claim on this basis does not persuade. *See Van Arsdall*, 475 U.S. at 684; *see also Baptista-Rodriguez*, 17 F.3d at 1371.

Petitioner cites *Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005), in support of his position. In *Kittelson*, the trial court excluded arguably exculpatory testimony from the only defense witness who was present when the alleged incident occurred. Further, the evidence in that case turned entirely on the credibility of the complaining witnesses, and the restriction imposed by the state court had the effect of creating the impression that the defendant had committed another crime. The excluded testimony in *Kittelson* was not cumulative, but rather "paramount to [the defendant's] defense." *Kittelson*, 426 F.3d at 321. In contrast to *Kittelson*, Petitioner was not prohibited from eliciting that Beckett, Sr. was under indictment for a California murder. Rather,

the court merely prevented Defendant from eliciting the details of that murder. In light of the foregoing, and application of the *Van Arsdall* factors, Petitioner's claim on this basis fails.

Beckett, Sr.'s Invocation of Privilege

As part of his Confrontation Clause claim, Petitioner also argues that the trial court erred when it allowed Beckett, Sr. to invoke his Fifth Amendment privilege in response to cross-examination regarding the California murder. Petitioner notes Beckett, Sr. was granted both contractual use immunity and transactional immunity for Mrs. Hamwi's murder. Further, Beckett, Sr. had the benefit of statutory use immunity pursuant to the self-executing provisions of Section 914.04, Florida Statutes (1993), when the prosecution called Beckett, Sr. at trial. Thus, Petitioner argues, given Beckett, Sr.'s grant of immunity, the trial court should not have allowed him to invoke the Fifth Amendment privilege to avoid being questioned about the California murder charges.

In support of his argument, Petitioner cites *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964), and *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). Petitioner claims (1) extra-jurisdictional respect for Florida immunity is compelled by the *Kastigar* rule that immunity must be "coextensive with the privilege," and (2) under *Murphy*, "every sovereign, state or federal, recognize[s] immunity granted by another sovereign." (*Petitioner's Obj.* [D.E. 64], p. 30). Petitioner contends California was bound by Florida's grant of immunity and

therefore the trial court violated the rules espoused in *Murphy*. The undersigned disagrees.

Beckett, Sr. was given immunity for the Hamwi murders only. The Contractual Grant of Use and Immunity Agreement not to Prosecute states in pertinent part:

> I, Ralph J. Ray, Jr on behalf of the State of Florida . . . hereby grant Use Immunity to Robert Wayne Beckett, Sr., and agree not to prosecute Robert Wayne Beckett, Sr., in connection with the death and/or sexual battery of Susan Hamwi which occurred in November, 1983 at her residence located at 1656 Poinsettia Drive, Fort Lauderdale, Broward County, Florida and the death of her minor child, Shane Hamwi at the same dates and location,
>
> * * *
>
> Provided, that said Robert Wayne Beckett, Sr. shall testify fully and truthfully under oath or affirmation before the representatives of the City of Fort Lauderdale Police Department, before [the] State Attorney of any Judicial Circuit in the State of Florida and/or his/her Assistant State Attorney and/or any Grand Jury proceeding or jury or non-jury trial . . . in the State of Florida concerning the deaths of the aforementioned Susan Hamwi and Shane Hamwi.

([D.E. 28], App., Vol. 11, Tab 224). The immunity Beckett, Sr. received did not address the California case.

The Court agrees with the Magistrate Judge's observation that the state court did not have the power to immunize Beckett, Sr. from the California prosecution, and thus the trial court could not compel testimony on the California case. If it were the case that California and Florida had jurisdiction over particular criminal acts, and one jurisdiction granted Beckett, Sr. immunity, then the other jurisdiction would be prohibited from making any use of the compelled testimony and its fruits. *See Murphy*, 378 U.S. at 79 ("[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal official in connection with a criminal prosecution against him.") But such was not the case. Petitioner's argument that under Beckett, Sr.'s immunity agreement California authorities could not use any statement relating to the California murder, and that therefore Beckett, Sr. could not invoke his Fifth Amendment privilege during trial when questioned about the California charges, does not persuade.

Hearsay Statements

As part of his Confrontation Clause Claim, Petitioner next argues that the testimony of Karen and Mark Smith, relating to conversations they had with Petitioner's co-defendant, Serio, constituted inadmissible hearsay and should never have been

allowed by the trial court. Karen and Mark Smith testified that Serio offered to kill Karen Smith's former husband in exchange for Mark Smith settling a debt. Karen and Mark Smith testified that during this conversation, Serio also mentioned he had previously performed a contract killing in Florida with someone named Beckett. (*See* [D.E. 17], T: 5911-12). According to Petitioner, the statements made by Karen and Mark Smith were improperly admitted by the trial court against Petitioner as declarations against the penal interest of Serio.

During the state proceedings, Petitioner objected to the admission of (1) co-defendant, Serio's confession, (2) Serio's admissions to Mr. and Mrs. Smith, and (3) tape recorded telephone conversations between Serio and Beckett, Sr. *(See Respondent's Response* [D.E. 71], pp. 16-17 (citing [D.E. 17], R. 309-327)). At a subsequent hearing to avoid any problems under *Bruton*,[9] the prosecution informed the court it would not introduce Serio's "confession" in its case in chief. *(See id.* at 17 (citing [D.E. 17], R. 506, 553)). However, the prosecution argued Serio's "admissions" to Mr. and Mrs. Smith and the taped telephone conversations were clearly admissible because they were not considered "confessions" under *Bruton*. The court disagreed in part with the prosecution and only allowed the taped telephone conversations and the comments to the Smiths to be admitted in evidence in a redacted fashion. (*See id.* (citing [D.E. 17], R. 818-826)).

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9. *Bruton v. United States*, 391 U.S. 123 (1968).

Thereafter, Petitioner withdrew his opposition to the admission of Serio's confession in full. (*See id.* (citing [D.E. 17], R. 1219-1223)). Consequently, the prosecution took the position that because Serio's confession was being admitted into evidence as a result of Petitioner having waived his *Bruton* objection, neither the taped telephone calls nor the testimony involving the Smiths needed to be redacted. The trial court disagreed and only permitted the statements to be presented to the jury in a redacted fashion. (*See id.* at pp. 17-19).

The testimony from Mr. and Mrs. Smith during trial regarding the statements Serio made to them was offered against Serio. Indeed, the witnesses, prior to testifying before the jury, were instructed that they were not to make any reference to Hamwi, the "guy from Colorado," or the ex-husband. (*See* Trial Transcript, Vol. 32, pp. 5902-03, Vol. 33, pp. 6008-6063).

Serio's statements to the Smiths were admissible as an admission, an exception to the hearsay rule under Section 90.803(18)(a) of the Florida Statutes. *See Wyatt v. State*, 641 So.2d 1336, 1339 (Fla. 1994). Furthermore, as to Petitioner, a hearsay statement may be admissible under the Confrontation Clause if the statement has sufficient indicia of reliability. *See Idaho v. Wright*, 497 U.S. 805, 819-20 (1990). That requirement has been satisfied here. The circumstances surrounding when the statements were made indicate their trustworthiness. Through the statements, Serio incriminated himself and was not trying to shift blame for the act he told the Smiths he committed. Serio made the statements to

individuals he considered friends, as opposed to a law enforcement agent while in custody on a serious charge.

Further, the statements did not present any *Bruton* violation. It is possible to avoid *a Bruton* violation by redacting from the co-defendant's statement all references to the defendant on trial. *See Bruton,* 391 U.S. at 134, n.10, *see also Richardson v. Marsh,* 481 U.S. 200, 209 (1987) (noting *Bruton* may be complied with by redaction). Here, the statements were elicited from the Smiths during trial in a redacted manner, in accordance with the trial court's ruling, and did not include any incriminating reference to, or mention of, Hamwi.

Moreover, the record indicates Petitioner had an opportunity to question the truthfulness of the statements through the cross-examination of Mr. and Mrs. Smith. (*See* [D.E. 17] T: 5907, 5923). The undersigned agrees with the Magistrate Judge that Petitioner had, and took advantage of, the opportunity to question the truthfulness of the statements made by the Smiths. Accordingly, the Court finds Petitioner's Confrontation Clause argument on this basis lacks merit. *See Van Arsdall,* 475 U.S. at 684.

Even assuming the trial court erred in admitting the statements, the error is harmless beyond a reasonable doubt given the record under review. The more relaxed standard of harmless error review applies in habeas proceedings. *See Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (establishing harmless error

standard that prohibits relief unless the constitutional error had a "'substantial and injurious effect or influence in determining the jury's verdict'") (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court considers Serio's statements and the evidence presented during trial to determine whether the trial court's ruling constituted harmless error. *See Smith v. State*, 746 So.2d 1162, 1170-71 (Fla. 1st DCA 1999) (finding improper admission of nontestifying codefendant's statement violated Confrontation Clause, but error was harmless); *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986). Here, Petitioner's guilt was established by other evidence, including Beckett, Sr.'s testimony, evidence of Petitioner paying Beckett, Sr. around the time of the murder, and testimony from other witnesses about the circumstances surrounding Petitioner's divorce. For these reasons, even if the state court erred in admitting Serio's statements through the testimony of Mr. and Mrs. Smith, the court's decision did not have a substantial and injurious effect on the outcome of the trial.

In light of the foregoing, the undersigned concludes Petitioner has failed to establish that the state court's findings involving (1) the impeachment of Bronson and Beckett, Sr., (2) Beckett, Sr.'s invocation of privilege, or (3) the statements by Mr. and Mrs. Smith, constituted a violation of a federal constitutional right or were decisions so egregious that they rendered Petitioner's trial fundamentally unfair. *See Brown*, 419 F.3d at 376. Petitioner has not established that the state court's adjudication of these claims resulted in a decision that

was contrary to, or involved an unreasonable application of, clearly established federal law, or was otherwise unreasonable in light of the evidence. *See Williams*, 529 U.S. at 376, 386.

Claim II: Prosecution's Use of Perjured Testimony

Part ofPetitioner's second claim arises from two memoranda authored by prosecutors. Those memoranda, the "Ray" memorandum and the "Loe" memorandum, were disclosed in response to a Public Records Act[10] request after Petitioner's direct appeal. The Ray memorandum was written by then Chief Assistant State Attorney Ralph Ray on December 8, 1992. The Loe memorandum was prepared by Assistant State Attorney W. Anthony Loe in October 1992.

Introduction of False Testimony

According to Petitioner, the Ray and Loe memoranda reveal that: (1) Detective Bronson perjured himself at trial and (2) prosecutors stood silent while Bronson perjured himself, when testifying that he did not believe Beckett, Sr. was the "hands-on" killer before the immunity deal was offered. Petitioner contends the jurors would have questioned Bronson's credibility if they had known the State suspected Beckett, Sr. was the hands-on killer prior to Bronson offering the latter

10. *See* Section 119.07, Fla. Stat. (2007).

immunity. Further, Petitioner argues federal habeas relief is warranted because the trial court applied the wrong "reasonable probability" standard instead of the "any reasonable likelihood" standard to the issue of whether the State's presentation of this purportedly false testimony affected the verdict.

"[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (internal footnotes and citations omitted). To succeed on this claim, Petitioner must establish: (1) the statements at issue were actually false, (2) the statements were material, and (3) the prosecution knew the statements were false. *See United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997) (quoting *United States v. Blackburn*, 97 F.3d 353, 357 (5th Cir. 1993)).

The Ray memorandum of December 8, 1992, states in part:

> Tim spoke to Beckett Sr.
>
> Yesterday[,] Beckett Sr. said if he's given complete immunity he'll tell all – he's got serious heart problems and he's going to die and doesn't want this on his conscience.
>
> Paul Schiro other guy (Phoenix)

> In his discussion w/Beckett he suggested Schiro didn't do the stabbing.

([D.E. 20], App., Vol. 3, Tab 129, Ex. 3).

The Loe memorandum, dated October of 1992, states in part:

> The memos in our case file from Barbara Barton and from Robert Carney indicate that an individual other than the individual tried and convicted in this case may be responsible for the murders. That individual's name is Robert Wayne Beckett.
>
> The memos indicate that the victim's estranged husband, Paul Hamwi, may have hired Robert Wayne Beckett to come from Colorado to kill his wife.

(*Id.* at Ex. 1).

The quoted memoranda do not clarify whether at the time Beckett, Sr. was offered immunity, Bronson was aware that Beckett, Sr. was the hands-on killer. Bronson testified that during his conversations with Beckett, Sr., Bronson informed Beckett, Sr. that Bronson believed Beckett, Sr. was involved in the murders. The information contained in the memoranda would not necessarily have added to Petitioner's ability to impeach Bronson. The memoranda, at best, may have highlighted some of the decisions Bronson made during the

investigation, with the information he then had available. (*See* [D.E. 17], T: 3446-57, 5911-12, 6346, 6372). Petitioner has failed to establish, even under the "reasonable likelihood" standard, that he is entitled to relief because he has not shown the existence of false statements or knowledge by the prosecution of such falsity. *See Agurs*, 427 U.S. at 103. Further, assuming Petitioner could have used the memoranda to impeach Bronson, as Petitioner suggests, there is no showing of a reasonable likelihood that the impeachment would have affected the judgment of the jury. *See id.*

Petitioner has not established the state court's adjudication of the claim resulted in an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States or was based on an unreasonable determination of the facts in light of the evidence presented before the court. *See* 28 U.S.C. § 2254; *Williams*, 529 U.S. at 376, 386. Accordingly, the request for habeas relief on this basis fails.

False Corroboration of Material Witness Testimony

According to Petitioner, the state corroborated Beckett, Sr.'s testimony with false information. Specifically, Petitioner contends that during closing arguments, the prosecution urged the jury to believe Beckett, Sr. because Beckett, Sr. testified Petitioner had informed him that Petitioner had spoken with somebody from Chicago to murder his wife. During closing

arguments, the prosecutor stated "Mr. Beckett said Paul Hamwi spoke to somebody from Chicago" and "[s]o does the rest of the evidence." (*See Petitioner's Obj.* [D.E. 64], p. 36). Petitioner claims this statement created the false impression at trial that Petitioner had related to Beckett, Sr. certain conversations between himself and Thomas Parry, as to Parry's ability to secure a "man from Chicago" to commit the murder.

Petitioner explains that during pretrial proceedings, Beckett, Sr. testified he had been told by Hamwi about a purported conversation between Hamwi and a Robert Carlson, a native of Chicago who was then living in Aspen, in which Hamwi reportedly sought assistance in hiring a killer. In a pretrial deposition Robert Carlson denied that such conversation with Hamwi had ever taken place. The prosecution, knowing about Carlson's prior testimony, called Thomas Parry, also from Chicago, who testified he had a vague conversation with Hamwi about securing a hit man. Thereafter, when Beckett, Sr. was called to testify at trial, the prosecutor only elicited from Beckett, Sr. that Hamwi had told Beckett, Sr. about attempting to secure the services of "someone from Chicago" to kill Mrs. Hamwi. (*Id.*). Petitioner claims the prosecution purposely avoided asking Beckett, Sr. about Carlson in order to be able to create the false impression before the jury that Beckett, Sr.'s testimony regarding his conversation with Hamwi about finding a hit man from Chicago and Parry's testimony were consistent.

The trial court addressed the issue in Petitioner's Motion for Post-Conviction Relief and found no improper

conduct or error in the way the evidence was presented. (*See* [D.E. 17], Vol. 6, Tab 151). The trial court found that any confusion created as to which person, Carlson or Parry, Petitioner had spoken to about killing his wife was not of sufficient magnitude to affect the verdict. (*See id.* at 5). The court emphasized:

> What was of major importance in this case was that there was evidence that [Petitioner] spoke to one or more people, including Thomas Parry, about finding someone to kill his ex-wife. The defense concedes in their motion that [Petitioner] had made some of these statements and that Beckett [Sr.] knew that [Petitioner] had talked to either Parry or Carlson about finding a hit man. The actual effect of confusing which of the two people the statements were made to is trivial and could not possibly have affected the verdict.

(*Id.*). The court's finding was affirmed without opinion.

As noted by the trial court, what was significant here was that Petitioner spoke to one or more persons about finding someone to kill his ex-wife. Indeed, other witnesses testified during trial that Petitioner expressed his displeasure with the financial obligations imposed by the divorce court and made several statements such as, "it would probably be a lot cheaper to get rid of her" and "it would be cheaper to get a hit man." ([D.E. 17], T: 3251, 3352, 3415, 3526, 3456-57, 6346-6372).

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Based on the present record, Petitioner has failed to demonstrate that the prosecution's presentation of the evidence and arguments during trial created a false impression or were fundamentally unfair and that there is a reasonable likelihood that such actions affected the jury's verdict. *See Bailey,* 123 F.3d at 1395-96. Having failed to satisfy his burden, Petitioner has not established that the state court's ruling was either contrary to any Supreme Court precedent, nor an unreasonable application thereof. *Williams,* 529 U.S. 362 at 376.

Claim III: *Brady* Violations

Petitioner's *Brady* claim also arises from the Ray memorandum and the Loe memorandum. With respect to the Ray memorandum, Petitioner argues it demonstrates that Bronson (1) discussed the facts of the murders with Beckett, Sr., contrary to Bronson's pretrial and trial testimony; (2) suggested in those conversations that Beckett, Sr. had killed Mrs. Hamwi; and (3) was aware, as were the prosecutors, that Beckett, Sr. was indeed the hands-on killer before immunity was extended by the State. Failure to disclose the Ray memorandum, Petitioner contends, constituted a violation of *Brady.*

Petitioner also claims the prosecution's failure to disclose the Loe memorandum resulted in a *Brady* violation because in addition to the information already discussed *supra,* this memorandum contained information regarding a fingerprint of Beckett, Jr. that

matched a fingerprint recovered from the crime scene. According to Petitioner, evidence that Beckett, Jr.'s fingerprints were found at the crime scene "could have been used with other available evidence to completely destroy the state's case that Beckett, Sr. had killed Mrs. Hamwi at Hamwi's request." (*Id.* at 44). Thus, Petitioner asserts, the materiality of the fingerprint evidence is established. Additionally, Petitioner notes the Magistrate Judge failed to address Petitioner's contention that the state court's ruling constitutes an unreasonable determination of the facts.

The trial court initially rejected these claims. The appellate court, however, found Petitioner had made a sufficient preliminary showing on the claim involving the Loe memorandum. *See Hamwi*, 805 So.2d at 101. Accordingly, the trial court held an evidentiary hearing as to that claim. Subsequently, the trial court denied Petitioner's claim and the appellate court issued a *per curiam* affirmance. *See Hamwi*, 913 So.2d at 609.

In order to successfully present a due process violation resulting from the prosecution's withholding of evidence, a defendant must prove the following: (1) the prosecution withheld evidence; (2) the evidence suppressed was favorable to the defendant or otherwise exculpatory; and (3) the evidence suppressed was material. *See Brady*, 373 U.S. at 87; *see also United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986) (citation omitted). In this context, evidence is considered material when a reasonable probability exists that its disclosure would have caused a different result at trial. *See United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

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With respect to Petitioner's *Brady* claim arising from the suppression of the Ray memorandum, Petitioner has not established that the evidence involving what knowledge Bronson had prior to offering immunity to Beckett, Sr. was necessarily favorable or otherwise exculpatory and material. The information contained in the Ray memorandum at best highlights some of the information available that may have been considered by Bronson and the prosecution before the immunity offer was presented to Beckett, Sr. As noted in the Magistrate Judge's Report, Petitioner's suggested impeachment of Bronson, would not have negated (1) Beckett Sr.'s testimony, (2) Serio's confession ([D.E. 17], T:5911-12), (3) evidence confirming that Petitioner had supplied Beckett, Sr. with a sum of money prior to the murder (*see id.* at A:280), and (4) testimony that Petitioner had spoken to one or more people about having his ex-wife killed (*see id.* at T:3352, 3446-3457, 6346, 6372). Petitioner has not sufficiently demonstrated "the government's evidentiary suppression 'undermine[d] confidence in the outcome of the trial.'" *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley,* 473 U.S. 667, 678 (1985)).

Similarly, Petitioner has not satisfied his burden with respect to the Loe memorandum. The Loe memorandum states in pertinent part:

> On the afternoon of October 12, 1992, I made arrangements for Tim Bronson and Carl Ciotola (FLPD latent print examiner) to

> meet with Dallas [clerk] the following morning. The three of them were to then go to the Clerk's evidence locker on Hillsborough Boulevard so that Carl could compare the latent prints in this case with the standards.
>
> The afternoon of October 13, 1992, I received a phone call from Tim Bronson. He informed me that Carl had made a 5 point comparison with one of the latents and one of Robert Beckett, Jr.'s fingerprints. Unfortunately, the standard print was not rolled completely. Tim called Folson prison in California, where Beckett, Jr. was incarcerated, to have his prints rolled again. I conveyed this information to Michael J. Satz, and Ralph J. Ray, Jr.

([D.E. 20], App., Vol. 3, Tab 129, Ex. 1).

The trial court, after reviewing the evidence presented and evaluating the witnesses' credibility, determined there was no match between Beckett, Jr. and any of the latents. The court emphasized the memorandum referred to a comparison, not a match. The court further determined the evidence at the hearing failed to establish Ciotola had even compared Beckett, Jr.'s standards with the latents. Rather, the court concluded from the testimony that the information contained in the Loe memorandum about a five point comparison was erroneous and likely the result of a miscommunication or misunderstanding. (*See* [D.E. 27] App., Vol. 10, Tab 192)).

Ciotola testified he did not conduct a five point comparison at the warehouse with Detective Bronson. He also stated his comparison of the standard prints (belonging to Beckett, Jr.) with photographs of latents taken by Detective White resulted in a negative finding. Further, he testified that no print matching Beckett, Jr. was ever produced. *(See id.*, App., Vol. 10,Tab 195)). The trial court's determination of the facts was not unreasonable in light of the record before it. *See* 28 U.S.C. § 2254(d)(2).

Petitioner has not shown the evidence in question was exculpatory or materially sufficient under *Brady*, as to establish a reasonable probability that disclosure of the memoranda would have altered the jury's verdict. Further, even considering the cumulative impact of the suppression of the Ray and Loe memoranda, there has not been a sufficient showing to undermine the outcome of the trial or otherwise establish it is reasonably probable that with disclosure there would have been a different result at trial. *See Kyles*, 514 U.S. at 436-38, 441. Because Petitioner has not established that the trial court's factual determination was unreasonable or that it misapplied clearly established federal law, Petitioner's request for habeas relief on this basis fails.

Claim IV: Ineffective Assistance of Counsel

Petitioner contends the trial court committed error when it determined his trial counsel provided him effective assistance. Specifically, Petitioner argues that his counsel: (1) failed to call favorable witnesses; (2) failed

to cross-examine Bronson and Beckett, Sr. with available materials that could have affected their credibility; (3) and failed to adequately advise Petitioner whether Petitioner should testify at trial.

In determining whether counsel has been ineffective, the Court must apply a two-part test, as recognized in *Strickland v. Washington*, 466 U.S. 668 (1984). The court must determine: (1) whether counsel's performance was deficient such that it "fell below an objective standard of reasonableness," and (2) whether this deficient performance prejudiced the defense such that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688 & 695. Review of counsel's conduct is highly deferential, especially where strategy is involved. *Id.* at 689; *see also Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994) (citation omitted).

As noted in the Report, tactical or strategic choices by counsel cannot support a collateral claim of ineffective assistance. *See United States v. Costa*, 691 F.2d 1358, 1364 (11th Cir. 1982). Generally, decisions on whether or not to call a witness are questions of trial strategy. *See id.; see also Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001). Further, in order to succeed on an ineffective assistance of counsel claim, Petitioner must show that the state court, in rejecting Petitioner's claim, applied the *Strickland* standard to the facts in an "objectively unreasonable manner." *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (citing *Bell v. Cone*, 535 U.S. 685, 699 (2002)).

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According to Petitioner, his trial counsel was ineffective because he failed to call two critical witnesses, Earl Ross and Susan Tomanek, who would have testified they had seen Susan Hamwi alive on November 3, 1983, days after the prosecution argued she was murdered. As noted in the Report, the defense theory was that, unbeknownst to Petitioner, Beckett, Sr. visited Susan Hamwi in an attempt to negotiate the divorce settlement, and when he learned the divorce was final, killed Susan to stop her from using the phone. ([D.E. 17], T: 7437-7448, 7475-7481). Petitioner's theory of defense was based upon the nature of Beckett, Sr.'s visit, and not the exact date it occurred.

In its denial of Petitioner's post trial motions, the trial court stated:

> Under both the State's theory that this was a "murder for hire" or the defense theory that this was a "murder on spec," there is no debate that Robert Beckett, Sr. killed Susan Hamwi and that Paul Serio was present in the house at the time of the murder.
>
> * * *
>
> More importantly, there was no prejudice to the defense in failing to call the two witnesses.
>
> * * *

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> . . . [T]he exact date of the crime was not crucial. What was crucial was who committed the crime and why. The state and defense appeared to be in agreement that Robert Becekett, Sr. committed the murder.

([D.E.23], App. Vol. 6, Tab 151, pp. 9-10). The date of Susan Hamwi's murder would have been relevant if, for example, the dates suggested Petitioner knew nothing of Beckett, Sr.'s plan until after the murder. Petitioner argues no such thing.

Even assuming, as Petitioner suggests, that the exact time of death was critical, counsel for Petitioner and Serio questioned several witnesses extensively about Susan Hamwi's time of death. (*See* [D.E. 17], T: 5233-5252, 5298-5300). Numerous other witnesses stated they spoke to or saw Mrs. Hamwi alive during the first days of November 1983, including Ed Sciaretta, who testified during cross-examination that he had last seen Mrs. Hamwi alive on November 4, 1983. (*See* [D.E. 17], T: 2293-2310). Thus, while there was no trial testimony from Ross and Tomanek about when they last saw Mrs. Hamwi, other witnesses provided similar testimony. The undersigned agrees with the Magistrate Judge that, at best, Ross' and Tomanek's testimony would have been cumulative.

Again, the decision by Petitioner's counsel not to call Ross and Tomanek was a tactical decision and is not a sufficient basis for Petitioner's claim of ineffective assistance. Accordingly, the lower court's denial of

Petitioner's claim on this basis was not a misapplication of *Strickland*. Nor is the court's finding an unreasonable determination of the facts.

Similarly, Petitioner's claim that his counsel was ineffective because he failed to effectively cross-examine Bronson and Beckett, Sr. is without merit. Petitioner argues his counsel was ineffective because he (1) failed to cross-examine Bronson on the "man from Chicago" ploy; (2) failed to cross-examine Beckett, Sr. on his personal bias against Petitioner, stemming from a mistaken belief that Petitioner had an affair with Beckett, Sr.'s wife; and (3) failed to cross-examine/impeach Bronson's testimony that he had no reason to believe Beckett, Sr. was the killer prior to offering immunity. The trial court rejected Petitioner's claim on this basis, finding that Petitioner's proposed questioning would not have placed the case in another light or otherwise have altered the outcome of the trial. The undersigned agrees.

Further questioning, as Petitioner suggests regarding the "man from Chicago" issue, would not have undermined the outcome of the case. As the trial court noted, the effect of confusing which of the two people from Chicago the statements were made to is trivial. What was significant was that there was evidence that Petitioner spoke to one or more people, including Robert Parry, about finding someone to kill his ex-wife. Indeed, the defense conceded Petitioner had made some of these statements and that Beckett, Sr. knew Petitioner had talked to either Parry or Carlson about finding a "hit man." ([D.E. 23], App., Vol. 6, Tab 151, p. 5).

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The trial court reasoned

> additional cross-examination or objections on this issue would have only reinforced for the jury that [Petitioner] was talking to people about having his ex-wife killed at a time that was close in proximity to when an associate of [Petitioner] actually killed his ex-wife. This is so even considering the affect [sic] it would have had to have called Mr. Carlson as a witness to deny ever talking to [Petitioner] about killing his ex-wife.

(*Id.* at 6). The Court agrees with the Magistrate Judge's conclusion that it was reasonable for Petitioner's counsel to avoid reenforcing this notion.

Petitioner has also failed to show he was prejudiced when his counsel did not cross-examine Beckett, Sr. on a supposed bias based on a mistaken belief that Petitioner had an affair with his wife. The record does not support Petitioner's assertion that Beckett, Sr. tailored his testimony to implicate Petitioner because he suspected Petitioner had an affair with Beckett, Sr.'s wife. And nothing in the record suggests Petitioner had an affair with Mrs. Beckett.

Petitioner's ineffective assistance of counsel claim based on counsel's decision not to cross-examine Bronson concerning the latter's knowledge of Beckett, Sr.'s involvement in the murder before immunity was offered similarly fails. Petitioner has not shown this line

of questioning would have affected the verdict. Bronson's knowledge regarding the degree of Beckett, Sr.'s involvement in the murders prior to the offer of immunity has no bearing on whether or not Petitioner hired Beckett, Sr. to kill his ex-wife. Petitioner has not established his counsel was ineffective on this basis and the state court properly denied Petitioner's claim under *Strickland.*

Next, Petitioner contends his counsel failed to adequately advise him regarding his decision of whether to testify at trial. Petitioner's claim is not supported by the record. As the Magistrate Judge noted in his Report, the record is replete with evidence indicating Petitioner knowingly and voluntarily decided not to testify at trial.

Petitioner argues the Magistrate Judge's Report is erroneous because it is based on the trial judge's inquiry of Hamwi and the post conviction ruling which failed to consider the state's "man from Chicago ploy." Petitioner's argument does not persuade. Even assuming Petitioner had taken the stand to discredit the prosecution's alleged ploy to create confusion, he has failed to show there is a reasonable probability that the use of such strategy would have altered the outcome of the case. *See Strickland,* 466 U.S. at 688, 695. In finding no merit to Petitioner's claim on this basis, the trial court noted:

> Trial counsel undoubtedly gave a great deal of consideration to every area that the

> Defendant would have had to explain while being cross examined by a very experienced and extremely skillful prosecutor.

([D.E. 17] T: 6778-6781).

In light of the foregoing, Petitioner has not established he received ineffective assistance of counsel under *Strickland* or that the state court applied the *Strickland* standard to the facts in an objectively unreasonable manner. *See Strickland*, 466 U.S. at 688, 695; *see also Rutherford*, 385 F.3d at 1309 (noting that to succeed on an ineffective assistance of counsel claim, petitioner must do more that satisfy *Strickland*, petitioner "must also show . . . the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.") (internal citation omitted).

Request For An Evidentiary Hearing

Petitioner requests an evidentiary hearing on the *Brady* claims and the ineffective assistance claim. Under the guidelines of the AEDPA, if an individual seeking habeas reliefhas failed to develop the factual basis of a claim in state court proceedings, the Court shall not hold an evidentiary hearing on the claim unless the applicant shows that

> (A) the claim relies on
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the

> Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(2).

Petitioner is entitled to an evidentiary hearing on a claim if he alleges facts that, if proved at the hearing, would entitle Petitioner to relief *See Bolender v. Singletary,* 16 F.3d 1547, 1555 n.9 (11th Cir. 1994) (citation omitted). An evidentiary hearing is not necessary, however, where the state courts have made findings of fact relevant to the claims at issue as those findings are entitled to a presumption of correctness. *Id.* (citation omitted). Additionally, an evidentiary hearing is not necessary where the proffered evidence would not affect the resolution of a claim. *See id.* (citation omitted).

Here, the state court made the findings of fact necessary to decide the issues on appeal. Further, Petitioner has not shown how the proffered evidence would affect the resolution of any of his claims or

otherwise entitle him to relief. In light of the Court's finding that the state court did not act contrary to, or unreasonably apply, federal law, the undersigned must defer to the state court's adjudication on the claims. *Id.*; *see also Breedlove v. Moore*, 279 F.3d 952, 961 (11th Cir. 2002). Accordingly, the Court finds Petitioner has not satisfied his burden and denies his request for an evidentiary hearing.

In light of the foregoing, and for the reasons stated in the Magistrate Judge's Report and Recommendations, it is hereby

ORDERED AND ADJUDGED that the Report is AFFIRMED. Petitioner's Amended Petition for Writ of Habeas Corpus and the Amended Request for Hearing are DENIED. The Clerk of Court is instructed to mark this case CLOSED.

DONE AND ORDERED in Chambers, at Miami, Florida on this 3rd day of June, 2008.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Hon. William C. Turnoff
counsel of record

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 15, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 01-6731-CIV-ALTONAGA/TURNOFF

PAUL ROBERTS HAMWI,

Petitioner,

vs.

JAMES MCDONOUGH,
Secretary, Florida Department of Corrections

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE is before the undersigned on Petitioner, Paul Roberts Hamwi's Amended Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §2254 [**D.E. 14**] and his memorandum in support [**DE 35**]. Also before the Court is the Amendment to Petitioner's Request for a Hearing [**D.E. 55**] as to certain claims. These matters were referred to the undersigned for a Report and Recommendation by the Honorable Cecilia M. Altonaga on June 26, 2006. [**DE 34**].

Appendix C

The responsive pleading in this case, i.e., Respondent's Response to Order to Show Cause[1] was filed on December 11, 2006 [**D.E. 38**]. Petitioner requested, and was granted, leave to file a Reply. [**D.E. 42**]. The Reply was filed on March 21, 2007. [**D.E. 49**]. A hearing on this matter took place before the undersigned on June 12, 2007.

Upon careful review of the Amended Petition and supporting memorandum [**D.E. 14 & 35**], the response [**D.E. 38**], the reply [**D.E. 49**], the Amendment to Petitioner's Request for Hearing [**D.E. 55**], the underlying criminal court file, hearing argument from counsel, and being otherwise duly advised in the premises, the undersigned **RESPECTFULLY RECOMMENDS** that the Amended Petition [**D.E. 14**] and the request for an evidentiary hearing [**D.E. 55**] be **DENIED**. Consistent with the foregoing, the undersigned's findings are set forth below.

Factual Background

This case has a very long and tortured twenty-four (24) year history. The history includes, *inter alia*, related and unrelated criminal proceedings, an underlying divorce case, a wrongful conviction (of another individual) and a subsequent appeal. The

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1. This document, although captioned as a Response to Order to Show Cause, contains Respondent's response to the Amended Petition.

following is a condensed factual summary generated from the voluminous materials contained in the court record.[2] The relevant events that are the subject of the Amended Petition are categorized below.

Hamwi Marriage

The record in this case reveals that Petitioner married Susan Bolender on October 26, 1981. She was pregnant at the time. The couple executed a prenuptial agreement before the wedding. They separated within a month and began living apart.

On May 12, 1982, Mrs. Hamwi gave birth to a daughter, Shane Hamwi. Petitioner filed for divorce in September of that year. The divorce was anything but amicable. On June 29, 1983,[3] a Colorado court issued a divorce decree and declared the prenuptial agreement void, after determining that Petitioner, ". . . . ha[d] been less than candid about his assets and income." See [D.E. 27], App. Vol. 10, Tab 213. In so doing, the Court ordered Petitioner to pay the following: $12,157.81 for Mrs. Hamwi's attorney's fees; $12,000 to Mrs. Hamwi

2. For purposes of this Report and Recommendation, the record includes the voluminous state court files that have been docketed as fourteen (14) volume appendices to the Amended Petition. See [D.E. 18, 19, 120, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, & 31]. Said files contain, among other things, the transcripts of both the trial proceedings (1/27/94-3/23/94), and the sentencing proceedings (6/10/07, 6/24/07 & 7/1/94).

3. The decision was announced from the bench. A written order followed on July 18, 1983.

for disposition of the marital property; $500 per month in spousal maintenance until their daughter Shane entered the first grade; and $500 per month in child support until Shane reached the age of majority or until her death or emancipation. *Id.* Petitioner sought a new trial.

Subsequently, in August 1983, Susan Hamwi moved to Fort Lauderdale, Florida. On September 7, 1983, the Colorado court denied Petitioner's Motion for a New Trial. An appeal followed. On September 8, 1983, Susan Hamwi obtained a contempt order against Petitioner for failure to pay support—same was served in open court that very day. *Id.* at Tab 216. A show cause hearing as to Mrs. Hamwi's Motion for Contempt was set for October 18, 1983. *Id.* Said hearing was reset due to Petitioner's illness. Mrs. Hamwi filed a Motion to Enforce the Contempt Order on October 31, 1998. That motion would never be heard.

Hamwi Murders

On November 8, 1983, Susan and Shane Hamwi were both found dead in their Fort Lauderdale home. Susan Hamwi was found in the kitchen with a knife blade lying on her chest and the broken handle of the knife on the floor next to her body. There were two stab wounds to her chest, one of which was a fatal blow to her heart. The kitchen telephone cord was wrapped around her neck. Eighteen-month-old Shane Hamwi died from neglect sometime after her mother was killed.

Appendix C

Wrongful Conviction of John Purvis

Initially, the police focused on John Purvis, a schizophrenic neighbor, who was seen in the vicinity of Susan Hamwi's home on November 3, 1983. In March of 1985, Purvis was convicted of the murders. His conviction was upheld on appeal in 1987, and was affirmed by the Eleventh Circuit in 1991. Certiorari was denied by the U.S. Supreme Court in 1992.

On October 1, 1992, Purvis's counsel began investigating and demanded records from the Fort Lauderdale Police Department. Detective Timothy Bronson ("Bronson") was assigned to respond to the request. Shortly thereafter, the case caught the attention of the media when a television program aired a story about the Purvis conviction. The reopening of the case and subsequent investigations led to Purvis' exoneration in 1993.

The Becketts

On October 9, 1992, Bronson began investigating Robert Beckett, Sr. ("Beckett Sr.") in relation to the Hamwi murders.

As background, Beckett Sr. had long since been a suspect in the 1981 California murder of a woman, Tracy Stewart. Various documents in the record suggest that Beckett Sr. persuaded his son Robert Beckett, Jr., ("Beckett Jr.") to help him find a young woman to rape and murder ("thrill killing"). Details of the Stewart

murder as provided by Beckett Jr. can be found in the Amended Petition. *Am. Pet.* **[D.E. 14, p. 14]**. Beckett Jr. confessed to the Stewart murder in 1987 leading to both Becketts being first charged in 1988. However, the younger Beckett refused to testify against his father, forcing the prosecution to drop the charges six months later. Beckett, Jr. was ultimately convicted and is serving a life sentence.[4]

On or about October 18, 1992, Bronson visited Aspen, Colorado, and spoke with Detective Gary White ("White"). White had previously provided the Fort Lauderdale Police Department with information on Beckett Sr. On this occasion, White provided Bronson with information, fingerprint cards and old notes relating to the senior Beckett.

Bronson called Beckett Sr. on November 17, 1992. The testimony regarding that telephone conversation is contradictory. Bronson testified at trial that he told Beckett Sr. that he was investigating the Hamwi murders, but did not specifically mention Paul Hamwi. Beckett Sr. later testified that he did not understand what Bronson was talking about until the name Paul Hamwi was mentioned.

On November 23, 1992, Bronson called Beckett Sr. a second time, but was told to call his lawyer instead.

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4. On July 13, 1993, Beckett Sr. was again arrested for the Stewart murder. On October 12, 1993, just before the commencement of Petitioner's trial, Beckett Sr. was indicted for the Stewart murder.

On December 2, 1992, Bronson called a third time. According to Beckett Sr., the possibility of immunity was raised for the first time during this conversation. On December 7, 1992, Bronson called a fourth time. Bronson claims that the issue of immunity was first raised during this call. The record is not entirely clear on exactly what was known or suspected by law enforcement at that time.

The record, however, does show that Bronson, along with Chief Assistant State Attorney Ralph Ray and Assistant State Attorney Anthony Loe, decided to grant Beckett Sr. full immunity on December 8, 1992. According to Bronson, the decision was made because the case was otherwise at a dead end. During that time, Bronson claimed to have identified one Paul Michael Serio[5] as his prime suspect.

On December 14, 1992, Bronson, Ray and Beckett Sr. executed a transactional immunity contract. Bronson claims that he never asked for a pre-immunity proffer of testimony from Beckett Sr. According to Bronson, he was taken completely by surprise when Beckett Sr. admitted that he himself had killed Susan Hamwi at Petitioner's request, and that Serio was his accomplice.

On December 22, 1992, at Bronson's direction, Beckett Sr. made several telephone calls to Petitioner

5. The record contains various spellings for this individual's name, e.g., "Cerio" "Schiro" and "Schirio." For purposes of this report, the undersigned shall refer to Paul Michael Serio as the suspect, and later co-defendant, in the underlying murder trial.

in an attempt to elicit incriminating information about the murders. [**D.E. 20**], App. Vol. 3, Tab 125(3). During the conversations, Beckett Sr. claimed that he "got some people down my neck here in Florida" and "they are re-opening it all over me." *See Id.* During the calls, Beckett Sr. claimed that he needed Petitioner's help and referred to "doing a number on Susan for you," and "I killed her for you." *Id.* In the course of the conversation, Hamwi indicated "I don't know what you are talking about," while at the same time making repeated offers to be of assistance to Beckett Sr., e.g., ". . . . I can wire you money somewheres [sic]." *Id.* During the call, Hamwi also laid the blame for Beckett Sr.'s situation — being investigated for Mrs. Hamwi's murder — on Beckett Jr. and Detective White, referring to the latter as "your buddy . . . that cop. . . . had it in so much for you here." *Id.*

On January 12, 1993, Petitioner was charged by a grand jury in Broward County, Florida, with two counts of murder in the first degree for killing Susan Hamwi and Shane Hamwi. Petitioner was tried jointly with Paul Serio, who had confessed to having been an accomplice to the murders. Beckett Sr. testified that he killed Susan Hamwi on or about November 1, 1983, in Fort Lauderdale, Florida, and that Serio had been his accomplice.

At trial, the State theorized that this was a "murder for hire" killing, and that Petitioner hired Beckett Sr. to kill his wife in order to avoid paying child support and alimony. Petitioner's theory was that Beckett Sr. — knowing how upset Petitioner was at the alimony and

support payments — took it upon himself to kill Mrs. Hamwi in an attempt to ingratiate himself with Petitioner.

On June 24, 1994, after almost ten (10) weeks of trial, Petitioner was convicted of first-degree murder and subsequently sentenced to life imprisonment. Petitioner remains in the custody of the state of Florida.

Procedural Background

Petitioner was indicted on two counts of First Degree Murder concerning the 1983 murder of his former wife, Susan, and their 18-month old baby, Shane. *See* **[D.E. 18]**, App., Vol. 1, Tab 1. At trial, the jury found Petitioner guilty of the First Degree Murder of only his former wife. **[D.E. 19]**, App., Vol. 2, Tab 106. He was sentenced to life in prison. *Id.* at Tab 119.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal. **[D.E. 20]**, App., Vol. 3, Tab 125. The conviction and sentence were affirmed in a *per curiam* opinion entered October 9, 1996. *Hamwi v. State*, 681 So. 2d 291 (Fla. 4th DCA 1996). No further review was sought at that time; thus, the conviction and sentence became final on January 7, 1997.

On May 7, 1997, Petitioner filed a Motion to Correct Illegal Sentence arguing that the imposition of restitution was illegal. *See* **[D.E. 38]** Answer, Ex. A. The trial court denied the motion on July 17, 1997. *Id.* at Ex.

B. The denial was appealed to the Florida Fourth District Court of Appeal. Subsequently, Petitioner requested, and received, a voluntary dismissal of his appeal from the Fourth District Court of Appeal on June 23, 1998. *Id.* at Ex. C.

In the interim, Petitioner filed a motion for post-conviction relief on January 5, 1998, raising seven grounds for relief. *See* **[D.E. 20]**, App., Vol. 3, Tab 127; *see also* **[D.E. 23]**, App. Vol. 6, Tabs 138, 142, & 145. The trial court denied the motion on September 15, 2000. *Id.* at Tab 151. Petitioner attempted to amend his motion, but the trial court ultimately denied both the motion for rehearing and the amended motion for post-conviction relief on March 21, 2001. *See* **[D.E. 24]**, App., Vol. 7, Tab 163. An appeal followed.

The appellate court affirmed the trial court's summary denial of all claims but "ground 1" (a *Brady* violation regarding the suppression of fingerprint evidence), which was remanded to the trial court for an evidentiary hearing. *See Hamwi v. State*, 805 So. 2d 101 (Fla. 4th DCA 2002). After holding the evidentiary hearing, the trial court entered an Order denying the Motion for Post-Conviction Relief on January 16, 2004. **[D.E. 27]**, App. Vol. 10, Tab 192. Petitioner appealed that denial as well. The appellate court entered its *per curiam* affirmance on November 2, 2005. *Id.* at Tab 200. The Mandate followed on November 18, 2005.

The instant Petition was originally filed in this court on May 2, 2001. *See* **[D.E. 1]**, Pet. for Writ of Habeas

Corpus. On the same day, however, Petitioner moved to abate the proceedings. *See* **[D.E. 2]**. On February 27, 2002, Magistrate Judge Frank J. Lynch entered a Report and Recommendation recommending that the Petition be denied pending exhaustion of all state remedies. *See* **[D.E. 9]**. Judge Wilkie D. Ferguson adopted Judge Lynch's recommendations and denied the Petition accordingly. *See* **[D.E. 11]**. However, that Order was later vacated, and Petitioner's prior Motion to Abate was granted. *See* **[D.E. 12]**, Order Vac. Order Accepting Magistrate's Rep. & Recommend. (Mar. 20, 2002).

On June 9, 2006, Petitioner filed a motion seeking to re-open his case. *See* **[DE 14]**. At the same time, Petitioner filed the instant Amended Petition for Writ of Habeas Corpus, **[D.E. 14]**. This matter was re-opened on June 14, 2006. *See* **[D.E. 32]**. On March 21, 2007, Petitioner filed a Request for a Hearing **[D.E. 52]** and subsequently, an amended request **[D.E. 55]** on March 22, 2007. This court granted a non-evidentiary hearing **[D.E. 56]**, which was held on June 12, 2007.

Summary of Claims

The Amended Petition **[D.E. 14]** lists nine (9) claims with countless discrete subparts. For present purposes, the undersigned has condensed Petitioner's claims into the four (4) broad categories listed in the memorandum of law filed in support of same. **[D.E. 35]**, to wit:

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(1) **Confrontation Clause Violation:** Petitioner claims that his constitutional right to confront adverse witnesses at trial was violated by the state court's exclusion of critical impeachment evidence and admission of hearsay statements.

(2) **Government's Use of Perjured Testimony:** Petitioner claims that the state prosecutor knowingly presented false evidence by eliciting false testimony and providing false corroboration of a material witness's testimony.

(3) ***Brady* Violation:** Petitioner claims that the state suppressed favorable evidence by not producing memoranda that could have potentially impeached critical witness testimony.

(4) **Ineffective Assistance of Counsel in Violation of the Sixth Amendment:** Petitioner claims that he received ineffective assistance of counsel, because trial counsel failed to *inter alia: (a)* call favorable witnesses, (b) properly impeach two critical state witnesses, and (c) call Petitioner in his own defense.

Standard of Review

This court is required to entertain a petition for a writ of habeas corpus on "behalf of a person in custody pursuant to the judgement of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21

(1975). Claims brought pursuant to 28 U.S.C. § 2254 are not cognizable on federal habeas corpus review unless they were first presented to the state courts and are thereby "exhausted." *Anderson v. Harless*, 459 U.S. 4 (1982). A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *Williams v. Taylor*, 529 U.S. 362 (2000).

With respect to habeas petitions, clearly established federal law refers to the holdings of the Supreme Court's decisions as of the time of the relevant state court decision. *Hall v. Hall*, 310 F.3d 683, 690 (11th Cir. 2002) *citing Williams*, 529 U.S. at 412. A state court's rejection of a federal constitutional issue qualifies as an adjudication under 28 U.S.C. § 2254(d) that is entitled to deference even if the court rejects the claim summarily and without explanation. *Wright v. Moore*, 278 F. 3d 1253-54 (11th Cir. 2002)("[T]he summary nature of a state court's decision does not lessen the deference that is due."); *see also Parker v. Sec. for Dept. Of Corrections*, 331 F.3d 764 (11th Cir. 2002).

This presumption of correctness traditionally accorded to state court findings of fact in federal habeas corpus proceedings has been strengthened under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The deference which federal courts are required to pay to state court factual determinations under § 2254(e)(1) is now mandatory even where no state evidentiary hearing was held on the issue. *Mendiola v. Schomig*, 244 F.3d 589, 597-98 (7th Cir.), *cert. denied*, 533 U.S. 949 (2001); *Outten v. Kearney*, 2002 WL 531328, *2 (D.Del. 2002) ("[I]f the state court's finding is supported by the record, even though not by a 'hearing on the merits of the factual issue,' then it is presumed to be correct" under § 2254(e) (citing *Mendiola v. Schomig*, 224 F.3d 589, 592-3 (7th Cir. 2000)). Under the AEDPA, "state court factual determinations are presumed correct and a federal habeas petitioner is stuck with them unless he can rebut their correctness with clear and convincing evidence to the contrary." *Hunter v. Sec., Dep't of Corrections*, 395 F.3d 1196, 1200 (11th Cir. 2005).

In other words, Petitioner is not entitled to relief unless he can demonstrate that his factual allegations, if proven, would indicate that the state courts acted contrary to, or unreasonably applied, clearly established federal law when they rejected his claims.

The claims presented in the Amended Petition have been properly presented and thereby exhausted before the state courts; furthermore, the petition is timely, and well within the one-year statute of limitations. *See* [D.E. 38], Response, p. 5-7.

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Analysis

Claim I: Confrontation Clause Violation

Petitioner argues, *inter alia*, that he was denied the right to confront and cross-examine adverse witnesses at trial. Specifically, Petitioner claims that the state court unreasonably applied established United States Supreme Court precedent under the Confrontation Clause, and that said application allowed the prosecution to create false impressions for the jury in order to enhance the credibility of its two main witnesses: Beckett Sr. — the murderer, and Bronson — the lead detective.

The Confrontation Clause guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of witnesses for the prosecution. U.S. v. Baptista-Rodriguez, 17 F. 3d 1354, 1370 (11th Cir. 1994). This right, however, is not without limitation; a defendant is entitled only to an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense may wish. See U.S. v. Frost, 61 F. 3d 1518, 1525 (11th Cir. 1995). Such rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of a witness and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable. See Baptista-Rodriguez, 17 F. 3d at 1371. After that point, any further questioning is at the discretion of the trial court. See U.S. v. Diaz, 26 F. 3d 1533 (11th Cir. 1994).

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For present purposes — in the habeas context — federal relief is not available to retry state issues. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). In other words, Petitioner may not transform a state law issue into a federal one by asserting due process violations. *See Landford v. Day*, 110 F. 3d 1380 (9th Cir. 1996). Within these parameters, the undersigned has analyzed each of the claims as follows.

Exclusion of Impeachment Evidence

Bronson

Petitioner claims that Bronson would have been impeached on, among other things, his reasons for granting Beckett Sr. immunity, to wit: (1) the belief that Paul Serio (the accomplice) was actually the "hands on" killer; and (2) the fact that the case was otherwise at a dead end. To this end, the argument is that law enforcement made a hasty and ill-advised decision to grant immunity despite having good reason to believe that Beckett Sr. was the "hands on killer" of Mrs. Hamwi. Petitioner further claims that had the jury heard the details of the California "thrill killing," they would have discredited Bronson's testimony — that he had no reason to suspect Beckett Sr. The undersigned disagrees.

The record demonstrates that Bronson explained that he did not become aware of certain information regarding Beckett Jr. having implicated his father in the Hamwi murders until February 18, 1993 —

subsequent to the grant of immunity. Bronson also admitted that when he called Beckett Sr., in October 1992, the police and the State Attorney's Office already knew that Beckett Sr. was a suspect in the California murder. He did not review the California murder records prior to granting Beckett Sr. immunity despite knowing that Beckett Sr. had been arrested for that murder. **[D.E. 17]** (T: 4282, 4183). The grant of immunity was admittedly a "judgment call" based upon the information known to him at the time. **[D.E. 27]**, App., Vol. 10, Tab 195 (T:5772-73). Bronson explained that, at the time, he had information that a person named "Paul Shiro" — a known hitman — was also involved in the Hamwi murders. *Id.* at (T: 5771-75).

The record is fairly clear as to what Bronson knew and what he did with such information at each stage of the investigation. Petitioner sufficiently cross-examined Bronson in all relevant areas. Nothing in the record suggests that the details of the Stewart murder would have served to discredit Bronson in the eyes of the jury. Those gruesome facts would have added very little to mounting evidence against Petitioner. Consistent with the foregoing, the undersigned otherwise finds no Confrontation Clause violation, no evidence of reversible error as to either Bronson's testimony, or the scope of his cross-examination, and finds the claim to be otherwise without merit.

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Beckett Sr.

Petitioner makes similar arguments as to Beckett Sr. In particular, he claims that he was prejudiced when the prosecutor mentioned to the jury that Beckett Sr. had been "released by . . . California back in 1988." He also claims that he was denied the right to question Beckett Sr. about the facts of that murder, and thus, the jury may have been left with the false impression that there was no merit to the charges.

The trial court held that the facts surrounding the Stewart murder in California were inadmissible as the crime was not substantially similar to the Hamwi murder, and the evidence otherwise failed to meet the requirements of admissibility under Florida Statute, §90.404 (a) and (b). The court found such evidence to be impermissible propensity and character evidence. **[D.E. 17]** (T: 8946-47). In so doing, it limited the testimony regarding the California murder to: (1) the fact that Beckett Sr. was charged with rape and murder; (2) the fact that the charges were later dismissed against Beckett Sr. when Beckett Jr. refused to testify against his father; and (3) the fact that the case was still open when Beckett Sr. was questioned by Bronson — before the granting of immunity.

As noted above, the Fourth District Court of Appeals issued a *per curiam* affirmance without opinion; thereby finding no abuse of discretion. Petitioner contends that the appellate court's "silent affirmance of Hamwi's conviction" represents an unreasonable application of

United States Supreme Court precedent. Having carefully reviewed the entire record below, the undersigned disagrees.

First and foremost, a state court's adjudication on the merits, even if unaccompanied by an explanation for rejection, is still owed deference. The summary nature of a state court's decision does not lessen the deference due. *Wright v. Moore*, 278 F.3d 1245 (11th Cir. 2002). Secondly, at the federal level, and under the new constraints set forth by AEDPA, this Court need only determine whether the application was "objectively unreasonable."

Here, defense counsel engaged in sufficient cross-examination and the trial court neither abused its discretion, nor violated the Confrontation Clause. Petitioner herein was allowed to elicit that Beckett Sr. was given immunity and that he was charged with another murder in California. The allowed questioning, in and of itself, gave jurors sufficient information so as to question Beckett Sr.'s reliability and truthfulness.

Lastly, the undersigned is likewise not persuaded that the jury was under the false impression that there was likely no merit to the California charges. There is no evidence to support this contention. Quite the contrary, the record clearly showed that Beckett Sr. was not a "nice guy," and that he was still being implicated in a the 1981 murder twelve years later.

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In its opening statement, the prosecution stated,

> "The evidence is going to show that Robert Wayne Beckett, Sr. is a cold-blooded murderer."
>
> * * *
>
> "Now, Mr. Beckett is charged with murder in California. He's charged in a murder in California for which he was also charged in 1988."

See **[D.E. 17]** (T:1879-1898).

Clearly, the State was being up-front as to Beckett Sr.

The same theme was continued by both counsel for Petitioner and counsel for his co-defendant during their respective opening statements.

> ". . . . Robert Wayne Beckett . . . [is] awaiting trial in California for the murder of another woman. Now he's under the gun more than ever to try and work out the deal, not only to escape Florida's electric chair as he had done, but now to try to escape California's gas chamber."
>
> ". . . . [t]he evidence will show in this case that in 1987 Robert Becket Sr.'s son was arrested for the murder of Tracy Lea Stewart in August the 9th 1981 and that shortly subsequent thereto he rolled on his father who was then arrested for that offense and that his father

> spent time in jail on the word of his own son, until [the] son wouldn't testify and he was released in 1988."

Id. at (T:1917-15, 1947).

A similarly colloquy took place during Beckett Sr.'s cross-examination.

Q. Now, you are apparently charged in the State of California, are you not?

A. Yes.

Q. And what crime or crimes are you being charged with?

A. Homicide.

Q. And had you previously been charged with that same crime?

A. Yes.

Q. And when was that?

A. 1988.

Q. And you were arrested?

A. Yes.

Id. at (T:4494-95).

The record is clear. Neither party painted a pretty picture of Beckett Sr. The statements made by counsel more than clarified Beckett Sr.'s situation — leaving very little room for any possible misinterpretation or false impression.

Again, as noted *supra*, the admission of the gruesome facts of the California murder would have added very little to the already gory record evidence surrounding the details of the merciless slaying of Mrs. Hamwi, and the subsequent slow and horrible death of her daughter Shane. Such evidence, in the end, would only restate the obvious, as conceded by the State — Beckett Sr. is a cold-blooded murderer. As such, said details were properly kept out of the trial under the rules of evidence. Consistent with the above, the undersigned finds no violation of the Confrontation Clause sufficient to constitute reversible error.

Beckett Sr.'s Invocation of Privilege

As part of his "Confrontation Clause" claim, Petitioner argues that the trial court erred when it allowed Beckett Sr. to invoke his Fifth Amendment privilege in response to cross-examination on the California murder. That decision, claims Petitioner, was an unreasonable application of the principles established in *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964) ("a state witness may not be compelled to give testimony which may be incriminating under federal law *unless* the compelled testimony and its fruits *cannot* be used in any manner by federal officials in connection with the criminal prosecution against him")(emphasis added), and *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972) (immunity must be "coextensive with the privilege" for testimony to be compelled without infringing on the Fifth Amendment privilege). On appeal, Petitioner also argued that

Florida's immunity statute, Fla. Stat. § 914.04, was applicable as extending protection to a witness "who, in the course of his testimony, discloses a fact . . . which links him to an independent . . . criminal transaction." *See State ex rel. Hough v. Popper*, 287 So. 2d 282, 284 (Fla. 1973).

By way of summary, Petitioner argues that: (1) extra-jurisdictional respect for Florida immunity is compelled by the *Kastigar* rule that immunity must be "coextensive with the privilege," and (2) under *Murphy*, "every sovereign, state or federal, recognize[s] immunity granted by another sovereign." *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976) (citing *Murphy).* In other words, Petitioner claims that California was bound by Florida's grant of immunity; therefore, the trial court violated the rule espoused in *Murphy.* Based upon a review of the immunity agreement and the record herein, the undersigned disagrees.

Again, in the habeas context, it is presumed that state courts properly apply their own laws, and a federal court is bound to follow the state court's interpretation absent obvious subterfuge to evade consideration of a federal issue. *Woratz v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996); *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). The authority to grant immunity lies with the state, and the right to present a defense does not entitle defendant to demand immunity for his witnesses. *See Fountaine v. State*, 460 So. 2d 553 (Fla. 2d DCA 1984), *rev. denied*, 464 So. 2d 554 (Fla. 1985). Here, Beckett Sr. was given immunity for the Hamwi murders *only.* This is confirmed

by a cursory reading of the Contractual Grant of Use Immunity and Agreement not to Prosecute which states in pertinent part,

> I, Ralph J. Ray, Jr., ... on behalf of the State of Florida .... hereby grant Use Immunity to Robert Wayne Beckett, Sr., and **agree not to prosecute** Robert Wayne Beckett, Sr., **in connection with the death and/or sexual battery of SUSAN HAMWI** which occurred in November, 1983 at her residence located at 1656 Poinsettia Drive, Fort Lauderdale, Broward County, Florida **and the death of her minor child, SHANE HAMWI** at the same dates and location,
>
> PROVIDED that said Robert Wayne Beckett, Sr. shall testify fully and truthfully under oath or affirmation before the representatives of the City of Fort Lauderdale Police Department, before the [the] State Attorney of any Judicial Circuit in the State of Florida and/or his/her Assistant State Attorney and/or any Grand Jury proceeding or jury or non-jury trial... in the State of Florida concerning the deaths of the aforementioned SUSAN HAMWI and SHANE HAMWI.

See [**D.E. 28**], App., Vol. 11, Tab 224 (emphasis added).

At no time did the State of Florida grant Beckett Sr. immunity — implicitly or explicitly — as to any crime

other than the Hamwi murders. There was no need to, and the record is devoid of any intent to do so. Because the murders were not connected, the prosecution did not need any testimony related to the California case. Simply put, immunity from the California crime was not necessary in order to resolve the Hamwi murders.

Further, the undersigned is not persuaded that the constitutional scope of immunity protection would protect Beckett Sr. from prosecution in California using testimony from this Florida case. No such rule is created by *Murphy*. Murphy merely confirms that federal courts may compel testimony under grants of immunity — against a Fifth Amendment privilege — *only* if immunity covers all subsequent (federal or state) use of the testimony. *See Murphy*, 378 U.S. 52 (emphasis added). Again, the Florida court did *not* have the power to immunize Beckett Sr. from the California prosecution and thus, could not compel testimony on the California case. "[I]t is very doubtful that Congress would, if it had the power to, authorize one State to confer immunity on persons subject to prosecution under the criminal laws of another State." *Murphy*, 378 U.S. at 100 (White, J., concurring). Because there was no reciprocity, Beckett Sr. could still invoke his Fifth Amendment rights.

Consistent with the foregoing, the undersigned finds that there was no unreasonable application of the law, and no reversible error as to Beckett Sr.'s invocation of privilege.

Appendix C

Admission of Hearsay Statements

During Petitioner's trial, the state court allowed the prosecution to present two witnesses, Karen and Mark Smith, to relate the statements of co-defendant Serio. They testified that Serio, among other things, offered to kill Karen Smith's former husband in exchange for Mark Smith settling his debt, and that during the discussion Serio mentioned that he had previously performed a contract killing with someone named Beckett down in Florida. **[D.E. 17]** (T: 5911-12). Petitioner claims that "because there was no evidence of contact between Serio and Petitioner, and because the only knowledge Serio would have had (regarding Petitioner) would have come from Beckett Sr., the Smiths were actually relating Beckett Sr.'s statements, as told by Serio." *See* **[D.E. 35]**. The trial Court allowed these statements under Fla. Stat. 90.804(2) (c) as statements against penal interest. *See generally*, **[D.E. 17]** (T:5901-03).

Petitioner argues that these statements were improperly admitted against Hamwi as "declarations against [Serio's] penal interest," in violation of the Supreme Court standard in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Such an admission, according to Petitioner, violated the Confrontation Clause.

The State argued that *Ohio v. Roberts* was not applicable because the statements were otherwise admissible as admissions by a party (or co-conspirator) under Fla.Stat. § 90.803(18). *See generally Cruz v. New York*, 491 U.S. 186, 193 (1987).

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As a general matter, if a trial judge's order, judgment, or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason or an erroneous ground, the order, judgment or decree will be affirmed. *See, e.g. Owens v. State*, 354 So. 2d 118 (Fla. 3d DCA 1978).

Here, even assuming that the statements were improperly admitted as statements against penal interest, they were otherwise admissible as an admission of a co-conspirator. Further, there is sufficient evidence in the record to support both admissibility and the opportunity to question the truthfulness of the statements in question. The record herein demonstrates that both the Petitioner and the declarant (Serio) attacked the credibility of Mrs. Smith to the point of ridiculing her physical appearance, e.g., purple hair and the wearing of black makeup under her eyes; to wit: "Was your hair the same color as it is now?" "What about the dots under each eye?" [D.E. 17] at (T: 5907). "Is the purple hair part of any evil persona?" *Id.* at (T:5923). "And the cosmetics under the eyes, that has nothing to do with Medievalism?" *Id.*

Serio 's credibility was likewise attacked with, among other things, certain questioning and statements regarding his status in a certain society, i.e., the Society for Creative Anachronism, as, e.g., a "duke" or a "squire," as well as referring to him as "flaky" and an "outlandish liar." *See* [D.E. 17] (T:5934, 6406). For example, "Mr. Serio was kind of, in your words, a flaky

person, wasn't he?" "He told you that he worked for the CIA?" "He told you that he broke up a white slavery ring?" "That he played putt-putt golf with the Pope?" *Id.*

Consistent with the foregoing, the undersigned finds that the record indicates that the Petitioner had, and took advantage of, the opportunity to question the truthfulness of the statements at issue. Further, the undersigned finds that the evidence was admissible on other grounds, and as such the trial court and appellate court acted properly.

In light of the foregoing, the Court shall not address Petitioner's arguments as to the requirements under § 90.804(2)(c). However, the Court notes that, even assuming that *Roberts* is applicable to the case at hand, there is no evidence to suggest that the state courts applied a rule in contravention of any United States Supreme Court precedent. The undersigned finds no such objectively unreasonable application.

Claim 2: State's Use of Perjured Testimony

This claim arises from two (2) memoranda authored by the prosecutors that were disclosed pursuant to a Public Records Act request after Petitioner's direct appeal. The "Ray Memo" was written by then Chief Assistant State Attorney Ralph Ray on December 8, 1992. The "Loe Memo" was prepared by Assistant State Attorney W. Anthony Loe in October 1992.

Appendix C

Prosecutorial Introduction of False Testimony

Petitioner contends that the Ray and Loe Memos reveal, *inter alia*, that Detective Bronson: (1) perjured himself at trial, and (2) that prosecutors were privy to said perjury and stood silent while Bronson testified that he did not believe that Beckett Sr. was the "hands on" killer (prior to the immunity deal). According to Petitioner, these memos confirm that Bronson had discussed the murders with Beckett Sr. prior to any deal, and that Beckett Sr. was indeed suspected of being the actual murderer at the outset. The argument, similar to that raised in Claim 1 *supra*, is that the jury would have seriously questioned Bronson' s credibility if they had known that the state suspected that Beckett Sr. was the "hands on" killer prior to the immunity deal (and that Bronson had falsely testified to this). Petitioner further argues that federal habeas relief is proper because the trial court wrongly applied the "reasonable probability" standard instead of "any reasonable likelihood" to the issue of whether the State's presentation of this purportedly false testimony affected the verdict. The latter standard requires a reversal of a conviction when there is any "reasonable likelihood" that the false testimony could have affected the judgment of the jury. See Ventura, 419 F.3d 1279.

In order to obtain a reversal on this claim, Petitioner must establish: (1) that the statements at issue were actually false; (2) that the statements were material; and (3) that the prosecution knew that the statements were false. See United States v. Bailey, 123 F. 3d 1381, 1395-

96 (11th Cir. 1997). To prove such a claim, Petitioner must show that the testimony was more than merely inconsistent. *Id.* at 1395-96.

Here, the Ray Memo, which consists of a few handwritten lines and a few artistic sketches, states in relevant part,

> "Tim spoke to Beckett Sr."
>
> "Yesterday[,] Beckett Sr. said if he's given complete immunity he'll tell all — he's got serious heart problems and he's going to die and doesn't want this on his conscience."
>
> "Paul Schiro other guy (Phoenix)."
>
> "[I]n his discussion w/Beckett he suggested Schiro didn't do the stabbing." See **[D.E. 20]**, App. Vol. 3, Tab 129, Ex. 3.

The Loe Memo states in pertinent part,

> "The memos in our case file from Barbara Barton and from Robert Carney indicate that an individual other than the individual tried and convicted in this case may be responsible for the murders. That individual's name is Robert Wayne Beckett."
>
> ". . . The memos indicate that the victim's estranged husband, Paul Hamwi, may have

> hired Robert Wayne Beckett to come from Colorado to kill his wife."

Id. at Ex. 1.

Generally speaking, the allegations do not appear to rise to the level necessary to warrant federal habeas relief; especially in light of AEDPA's constraints — discussed *supra* — on state prisoner habeas petitions with claims that have been fully adjudicated in state court.

Further, the undersigned is unconvinced that Petitioner has shown, as he must, that the prosecutor knowingly used perjured testimony, failed to correct what he later learned was false, and that the falsehood, if any, was material. See Ventura v. Florida Attorney General, 419 F.3d 1269, 1277 (11th Cir. 2005). The undersigned also questions whether said memos were actually discoverable, given their work product nature.

Even under the "any reasonable likelihood" standard, Petitioner has failed to sufficiently demonstrate the merits of his claim. Specifically, it is not clear that either memorandum supports the allegation that Bronson actually gave false testimony in that he knew prior to the grant of immunity that Beckett Sr. had killed Hamwi. In his testimony, Bronson admitted that he had certain conversations with Beckett Sr. in which he (Bronson) told Beckett Sr. that he believed he (Beckett Sr.) was involved in the murder. The information in the memos would not have necessarily added to Petitioner's ability to impeach Bronson.

In addition, even if Bronson could have been impeached as to his testimony on this issue, there is "no reasonable likelihood" that this would have had any material effect on the judgment of the jury. In other words, this fact remains immaterial to the fundamental question of guilt or innocence. Bronson's thought process — as noted by the trial court — has little or nothing to do with the facts of this case as presented to the jury. Likewise, the timing and motives behind the grant of immunity to Beckett Sr. seem irrelevant to the resolution of the case against Petitioner.

At best, Petitioner has shown some inconsistencies as to certain testimony. This testimony—equivocal as it may be—does not constitute false testimony for present purposes. Regardless of what the detective believed, the key evidence was the testimony of Beckett Sr., and the corroborating evidence, which included, *inter alia*, Serio's statement that Beckett Sr. told him he had been hired to resolve a problem over a divorce settlement ([**D.E. 17**] (T: 5911-12)), evidence confirming that Petitioner had supplied Beckett Sr. with a sum of money just prior to the murder ((*Id.* at A:280)), and testimony that Petitioner had spoken to one or more people about having his ex-wife killed (*Id.* at (T:3352, 3446-3457, 6346, 6372)).

It is unlikely that any effect, if it existed, would be grand enough to alter the final verdict. We simply cannot automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to

have changed the verdict. See Giglio v. U.S., 405 U.S. 150 (1972). Again, the undersigned finds no violation of Supreme Court precedent, or otherwise established law by either state court.

False Corroboration of Material Witness Testimony

Petitioner argues that there was next to no evidence at trial to corroborate Beckett Sr.'s testimony that he had been hired by Petitioner to kill Mrs. Hamwi. Accordingly, he claims that the State corroborated Beckett Sr.'s credibility at trial *via* "utterly false" information. Specifically, Petitioner argues that in closing arguments the prosecutor, Ralph Ray, urged the jury to believe Beckett Sr., because of a statement that Beckett Sr. had made about one of his conversations with Petitioner. *See* **[D.E. 35]**. At some point during his closing argument the prosecutor said the following: "Mr. Beckett said Paul Hamwi spoke to somebody from Chicago" and "[s]o does the rest of the evidence." *Id.* quoting (T:7534-7541). This statement, says Petitioner, created the false impression at trial that Petitioner had related to Beckett Sr. certain conversations between himself and Thomas Parry[6] as to Parry's ability to secure a "man from Chicago" to commit the murder.

6. Thomas Parry, a former bookmaker from Chicago, worked as an electrician in Colorado in 1983. He testified that he told Petitioner (while having breakfast with a group of contractors) that he had been offered contact information ten years earlier (during his divorce) for "somebody that would eliminate [his] ex-wife." He testified that Petitioner asked him if he could "put him in touch with" someone who could eliminate his ex-wife. *See generally*, **[D.E. 35]** quoting (T:6212-13, 6230-35).

Appendix C

During his statement, Beckett Sr. said that Petitioner told him that he had a conservation with "Bob Carlson[7]" about murdering Mrs. Hamwi and that Carlson, "might know somebody out of Chicago." [**D.E. 17**] (A: 129). During the trial, Beckett Sr. testified that Petitioner told him that they were "going to try to find someone out of Chicago." *Id.* at (T:4349). Also at trial, Thomas Parry, formerly of Chicago, testified that Petitioner sought his assistance in finding someone to eliminate Mrs. Hamwi. *See* [**D.E. 35**] quoting (A:130). Petitioner claims the statement made during closing was improper, because it falsely corroborated that Parry was from Chicago. In sum, according to Petitioner, the prosecutor's act of tying the misleading testimony of Beckett Sr. to Parry created a materially false impression and violated Due Process.

The trial court reviewed this issue in connection with Petitioner's Rule 3.850 motion and found no improper conduct or error. The trial court found that any confusion created as to which person — Carlson or Parry — Petitioner spoke to about killing his wife was not of sufficient magnitude to affect the verdict. As previously noted, the appellate court affirmed the trial court's ruling without opinion.

Upon review of the record, the undersigned agrees with both courts. There is no reasonable likelihood —

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7. Robert Carlson, a transplant from Chicago, worked in the construction community in Aspen. He had met Petitioner when he first moved to Colorado several years prior to the murders.

under either standard — that the result would have been any different. What matters here is that Petitioner spoke to one or more people about finding someone to kill his ex-wife. The instant matter would have had a minimal effect in light of the other evidence in this case. Indeed, countless other witnesses testified that Petitioner expressed his displeasure with the divorce's financial outcome and made several statements to the effect, "it would probably be a lot cheaper to get rid of her" and "it would be cheaper to get a hit man." *See e.g.* **[D.E. 17]** (T: 3352, 3456-57, 6346-6372); **[D.E. 35]**.

Consistent with the foregoing, the undersigned finds that Petitioner's claim must fail. The record herein does not suggest any false impression, much less any Due Process violation as a result thereof. Accordingly, this Court finds that the state court's decision was neither contrary to any Supreme Court precedent, nor an unreasonable application thereof.

Claim 3: Brady Violations

Petitioner argues that the state suppressed material information relating to the Ray and Loe memoranda described above, and that these failures amount to violations of the rule the Supreme Court articulated in *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner again claims that the jury would have discredited the testimony of both Beckett, Sr. and Detective Bronson if the memos had been revealed at trial.

The trial court initially rejected these claims. The appellate court found that "Hamwi's motion made a sufficient preliminary showing on all three factors (as to one claim) to warrant an evidentiary hearing. See Hamwi v. State, 805 So. 2d 101 (Fla. 4th DCA 2002). On that basis, the trial court held an evidentiary hearing as to only one claim — the claim related to the Loe Memo and the alleged suppression of fingerprint evidence. Following the evidentiary hearing, the trial court denied Petitioner's motion. The appellate court later affirmed same via *per curiam* opinion. See Hamwi v. State, 913 So. 2d. 609 (Fla. 2005).

In Brady, the Supreme Court established three criteria that a criminal defendant must prove in order to establish a violation of due process due to the suppression of evidence, i.e., (1) that the prosecution withheld evidence; (2) that the evidence suppressed was favorable to the defendant or otherwise exculpatory; and (3) that the suppressed evidence was material. See United States v. Severdija, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material when a reasonable probability exists that its disclosure would have caused a different result at trial. See United States v. Bagley, 473 U.S. 667-674-75 (1985).

Petitioner's claims as to each memo shall be addressed below.

Appendix C

Ray Memo

Petitioner argues that the trial court's denial of an evidentiary hearing on this claim is "contrary to" United State Supreme Court precedent in two respects: (1) by erroneously applying a "sufficiency of the evidence" test; and (2) by ruling that Bronson's mental processes had very little or nothing to do with the facts of this case that were presented to the jury. In support of this contention, Petitioner cites to Kyles v. Whitley, 514 U.S. 419 (1995), which requires an inquiry as to whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict." *Id.* at 435. In that case, the defendant was convicted of first degree murder and sentenced to death. *Id.* at 419. The suppressed evidence included, among other things, contemporaneous eyewitness statements taken by police following the murder, statements made to police by an informant who was never called to testify, and a computer printout of license numbers of cars parked at the crime scene on the night of the murder which did not include Defendant's car. *Id.* In Kyles, the disclosure of the suppressed evidence to counsel would have made a different result reasonably probable. *Id.* at 441. There is no such probability in the case at hand.

First, the undersigned finds no evidence that the State suppressed evidence for purposes of *Brady.* In any event, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *See U.S. v.*

Bagley, 473 U.S. 667, 675 (1985). Further, (as noted in the discussion *supra* [pp. 22-23]), the undersigned is not convinced that the information in the Ray Memo is either favorable to the Petitioner, or material in the grand scheme of things. Most importantly, even applying the standard in *Kyles* in the light most favorable to Petitioner, this Court cannot conclude that the admission of such evidence would have put the case in an entirely new light sufficient to alter the verdict. Again, the effective impeachment of Bronson would not have negated Beckett's Sr.'s testimony and all of the other evidence independent of Bronson's proffered testimony, such as Serio's statement, the large sums of money transferred by Petitioner to Beckett Sr., and Petitioner's inquiries to several third parties while "shopping" for a killer.

Consistent with the foregoing, the undersigned finds no *Brady* violation, and no misapplication of any other United States Supreme Court precedent or otherwise established law.

Loe Memo

Petitioner makes similar *Brady* claims as to the Loe Memo — referred to in his Amended Petition as the "linchpin of the single claim on which [he] was granted an evidentiary hearing by the state courts." **[D.E. 35]**. As previously noted, the trial court conducted an evidentiary hearing on the sole remanded issue. Thereafter, the trial court concluded that the evidence at issue was immaterial; specifically, the court

determined that the putative five point (fingerprint) at issue had not occurred.

The memo in question memorializes, *inter alia*, communications between Bronson and Loe that took place *circa* October 1992. According to the memo, Bronson was seeking assistance in locating latent fingerprints to compare against the standard fingerprints of possible suspects in the Hamwi murders. *See* [D.E. 20], App., Vol. 3, Tab 129, Ex. 1. After looking at the prosecution file, Loe discovered other memoranda authored by then Assistant State Attorney Robert Carney and an investigator in the Purvis trial. Said information suggested that Petitioner and Beckett Sr. might have been involved in the murders.

The memo also includes a recitation of efforts made by Loe in furtherance of obtaining standard fingerprint cards for both Becketts (Jr. and Sr.). The memo states in pertinent part,

> On the afternoon of October 12, 1992, I made arrangements for Tim Bronson and Carl Ciotola (FLPD latent print examiner) to meet with Dallas [clerk] the following morning. The three of them were to then go to the Clerk's evidence locker on Hillsborough Boulevard so that Carl could compare the latent prints in this case with the standards.
>
> The afternoon of October 13, 1992, I received a phone call from Tim Bronson. He informed

> me that Carl had made a 5 point comparison with one of the latents and one of Robert Beckett Jr.'s fingerprints. Unfortunately, the standard print was not rolled completely. Tim called Folson prison in California, where Beckett, Jr. was incarcerated, to have his prints rolled again. I conveyed this information to Michael J. Satz, and Ralph J. Ray, Jr.

[D.E. 20], App. Vol. 3, Tab 129, Ex. 1.

The trial court's detailed order states in pertinent part,

> Three other fingerprint experts have compared the latent prints with the standard prints of Beckett Jr. All of the experts came to the same conclusion: there is no match between Beckett Jr.'s prints and the latents.
>
> * * *
>
> Having found that there was no five point match, or any comparison, the next issue before this Court is whether the State had a duty to disclose the information relating to the statement of an alleged fingerprint comparison. Defendant argues that the failure to disclose this alleged comparison constitutes a Brady violation. In order to establish a Brady violation, a defendant must establish

that: "[t]he evidence at issue must be favorable to the accused, either because it is impeaching; [2] that the evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Way v. State*, 760 So. 2d 903 (Fla. 2000).

Defendant has failed to show that the State suppressed favorable evidence of a fingerprint match between Becket Jr.'s standards and the latents from the crime scene. There was no match between Beckett Jr. and any of the latents. Moreover, the memo referred to a comparison, not a match. The evidence at the hearing also failed to establish that Ciotola had even compared Beckett Jr.'s standards with the latents. Rather, the testimony at the hearing indicates that the information contained in the memo by Tony Loe about a five point comparison was erroneous and likely the result of a miscommunication or misunderstanding. As such, this Court finds that Defendant has failed to establish that there was favorable evidence of a five point comparison or that the State suppressed favorable evidence of such a comparison.

Even assuming arguendo, that the State did have an obligation to advise Defendant of the erroneous information contained in the memo,

> Defendant has failed to show that he was prejudiced by the nondisclosure. In order to show that he was prejudiced, Defendant must show that the suppressed evidence was material. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Way*, 760 So. 2d at 913. Even if the State had revealed the erroneous information in the memo regarding the comparison, the reports, prior and subsequent to the memo all revealed that there was no match between Beckett Jr. and the latents from the crime scene. As such, the failure to disclose such information . . . was not "of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." *Young v. State*, 739 So.2d 553, 559 (Fla. 1999).

[D.E. 27], App., Vol. 10, Tab 192.

Petitioner argues that the trial court's ruling on the Loe memo was in error because under *Kyles* it should have determined whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict" and "whether in its absence he received a fair

trial." Petitioner further argues that the ruling is also contrary to *Kyles* because the state court never considered the cumulative impact of the two suppressed memos. The undersigned disagrees.

The first question under *Brady* is whether the state withheld evidence. It is clear from the record that the memo was not produced until after the appeal. However, that is not sufficient to constitute suppression. The trial court made no such finding and neither does this Court.

Additionally, Petitioner has not established that the evidence was favorable, otherwise exculpatory and materially sufficient to have caused a different result at trial — especially in light of the record evidence noted *supra*. Consistent with the foregoing, the undersigned finds that the trial court — after listening to the evidence and evaluating the witnesses' credibility — applied the proper standard under *Brady* and its progeny.

Finally, even looking at the *possible* cumulative impact of the memos, as Petitioner requests, the undersigned cannot conclude that the case would have been placed in a different light based upon the Loe Memo's mention of a *possible* five point match. In this connection, the court notes that: (1) Ciotola testified that he did not conduct a five point comparison at the warehouse with Detective Bronson; (2) Ciotola stated that his comparison of the standard prints (belonging to Beckett Jr.) with photos of latents taken by Detective White resulted in a negative finding; (3) that no print matching Beckett was ever produced; (4) that no finding

was made that the state concealed a matching fingerprint; and (5) that all the other evidence suggests that there was never a match and that the information was incorrect. *See* **[D.E. 27]**, App., Vol. 10, Tab 195 (T:5783-87, 5791).

In sum, based on its review of the Amended Petition and the supporting record, this Court finds that the trial court's ruling was neither an unreasonable application of, nor contrary to, established federal law. Simply put, Petitioner has failed to meet his burden of rebutting the presumption of correctness of the state courts by clear and convincing evidence. Again, § 2254 was not meant to create federal mini-retrials of state cases.

Claim 4: Ineffective Assistance of Counsel

As a general matter, Petitioner argues that the state court erred when it found that trial counsel, J. David Bogenschutz,[8] provided him with effective assistance. Specifically, Petitioner claims that his trial attorney: (1) failed to call favorable witnesses; (2) was derelict in his cross-examination of Beckett Sr. and Bronson; and (3) failed to call Petitioner in his own defense.

The standard for evaluating an ineffective assistance of counsel claim set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) requires a two-part

8. Mr. Bogenschutz has been a member of the Florida Bar since 1971. He was admitted to the Ohio Bar in 1969. He served as a Broward County State Attorney from 1971-1977.

analysis: (1) whether counsel's performance was deficient such that it "fell below an objective standard of reasonableness," and (2) whether this deficient performance prejudiced the defense such that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 668. "Unless a Defendant can make both showings, it cannot be said that the conviction or [death] sentence resulted from a breakdown of the adversary process that renders the result unreliable." *Id.* at 687. Review of counsel's conduct is highly deferential. *Strickland* at 689; *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). "Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

Tactical or strategic choices by counsel cannot support a collateral claim of ineffective assistance. *United States v. Costa*, 691 F. 2d 1358 (11th Cir. 1982). Decisions on whether or not to call a witness are generally questions of trial strategy. *See Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001). *see also*, *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997).

Apart from the deference to counsel's performance required by *Strickland*, as of 1996, the AEDPA also requires that Petitioner show that in rejecting the claim of ineffective assistance of counsel, the state court applied *Strickland* to the facts in an "objectively unreasonable manner." *Rutherford v. Crosby*, 385 F.3d

1300 (11th Cir. 2004) (citing *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Each of Petitioner's three (3) claims shall be addressed in turn.

Failure to call Favorable Witnesses

Petitioner claims that trial counsel's failure to call critical defense witnesses, Earl Ross and Susan Tomanek, constitutes ineffective assistance, because these witnesses would have testified that they had seen Susan Hamwi alive on November 3, 1983 –- days after she was murdered. Petitioner contends that this would have severely impaired the State's case against him. The undersigned disagrees.

As noted by Respondent, at trial, the defense theory was that, unbeknownst to Petitioner, Beckett Sr. visited Susan Hamwi, attempted to negotiate the divorce settlement, and that Beckett Sr. — surprised to learn that the divorce was final — killed Susan to stop her from using the phone. **[D.E. 17]**,(T: 7437-7448, 7475-7481). In other words, Petitioner's theory of defense was based upon the nature of Beckett Sr.'s visit, not the exact date of it.

In its denial of post trial motions, the trial court stated,

> Under both the State's theory that this was a "murder for hire" or the defense theory that

> this was a "murder on spec," there is no debate that Robert Beckett Sr. killed Susan Hamwi and that Paul Serio was present in the house at the time of the murder.
>
> * * *
>
> More importantly, there was no prejudice to the defense in failing to call the two witnesses.
>
> * * *
>
> . . . . [T]he exact date of the crime was not crucial. What was crucial was who committed the crime and why. The state and defense appeared to be in agreement that Robert Beckett Sr. committed the murder.

[DE 23], App., Vol. 6, Tab 151 (T: 00424 at pp. 9-10).

This Court concurs. The date of Susan Hamwi's death would have been relevant only if Petitioner denied that Beckett Sr. was the hands-on killer, or if the dates suggested that Petitioner knew nothing of Beckett Sr.'s plan until after the murder. Because Petitioner argues no such thing, calling these two witnesses to testify about the exact date of death was unnecessary.

In any event, both trial counsel and co-defendant Serio's counsel questioned several witnesses extensively as to Mrs. Hamwi's time of death. Detective Martin was questioned regarding Susan Hamwi's time of death.

[D.E.17], (T: 5233-5252 & 5298-5300). Ed Sciaretta also testified as to this issue on cross-examination — stating that he had last seen Mrs. Hamwi alive on November 4, 1983. *Id.* at (T:2293-2310). Further, countless other witnesses testified as to the last time they spoke to or saw Mrs. Hamwi alive. These witnesses range from an attorney (who visited her house and had her sign some documents), a neighbor who saw her at a Halloween party, an insurance agent (who came to see her, but left after no one answered the door), and various people who phoned her during the first days of November 1983. At best, Mr. Ross's and Ms. Tomanek's testimony would have been surplusage.

As such, Mr. Bogenschutz' tactical decision not to call these particular witnesses does not constitute ineffective assistance under Strickland. Even assuming, arguendo, deficient performance by counsel, Petitioner has not shown prejudice. Consistent with the foregoing findings, the undersigned finds that the trial court's decision was not an objectively unreasonable application of Strickland.

Derelictions on Cross-Examination of Critical Witnesses

Petitioner claims that Mr. Bogenschutz failed to cross-examine two critical State witnesses (Detective Bronson and Beckett, Sr.) with available materials that would have affected their credibility. Specifically, Petitioner contends that counsel was ineffective because: (1) he failed to derail the "man from Chicago"

ploy by cross-examining Beckett Sr. on this issue; (2) he failed to cross-examine Beckett Sr. on his personal bias against Petitioner — stemming from a mistaken belief that Petitioner had an affair with his wife, Kathy Beckett; and (3) he failed to cross-examine/impeach Bronson's testimony that he had no reason to believe Beckett Sr. was the killer.[9]

As to (1), the trial court concluded as follows:

> The Defendant appears to be arguing that the confusion created regarding which person the Defendant told Beckett that he talked to about getting someone from Chicago to commit this murder, was of sufficient magnitude that it affected the verdict. This Court disagrees with the Defendant's assessment of this evidentiary matter. What was of major importance in this case was that there was evidence that Defendant spoke to one or more people, including Robert Parry, about finding someone to kill his ex-wife. The defense concedes in their motion that the Defendant had made some of these statements and [that] Beckett knew that the Defendant had talked to either Parry or Carlson about finding a "hit man." The actual [affect] [sic] of

9. In support of this argument, Petitioner refers to portions of Bronson's notes that memorialize a meeting with White, a Colorado detective, wherein White states that Beckett Sr. told him that he stabbed Mrs. Hamwi and that his accomplice was "Ciero."

> confusing which of the two people the statements were made to is trivial and could not possibly have affected the verdict.

[D.E. 23], App., Vol. 6, Tab 151, (T:00424 at p.5).

In agreement, this Court finds that questioning aimed at further impeaching the witnesses' testimony would not have put the case in another light, or otherwise altered the outcome of the trial. Reiterating the trial court's findings, the importance of this testimony is that Petitioner solicited help from others to kill his ex-wife; precisely to whom he presented his inquiries is of no consequence.

The trial court's well-reasoned order further states,

> [A]dditional cross-examination or objections on this issue would have only reinforced for the jury that Defendant was talking to people about having his ex-wife killed at a time that was in close proximity to when an associate of the Defendant actually killed his ex-wife. This is so even considering the affect [sic] it would have had to have called Mr. Carlson as a witness to deny ever talking to Defendant about killing his ex-wife.

Id. at p. 6.

It is perfectly logical that trial counsel wanted to avoid reenforcing this notion, and thus did not further

question Beckett Sr. on precisely to whom Petitioner had spoken. Again, the undersigned finds no evidence of ineffective assistance or prejudice, and no objectively unreasonable application of *Strickland.*

The Court likewise finds claim (2) (as to Beckett Sr. purported personal bias) to be without merit. The trial court did not unreasonably apply the *Strickland* test when it found that failure to be insignificant. In order to reach a contrary finding, this Court would have to believe that Beckett Sr. tailored his version of the events to implicate Petitioner due to a suspected affair. Nothing in the record supports this claim. Looking at the totality of the circumstances, the undersigned remains unconvinced that the failure to cross-examine on Beckett Sr.'s "supposed bias," which was based on a "mistaken belief" (that Petitioner had an affair with his wife), resulted in any prejudice, or that such evidence would have changed the outcome.

As to (3) *supra*, the trial court found that, even if Bronson were lying about his degree of knowledge when he offered Beckett Sr. immunity, same would not have changed the outcome. In denying the claim, the trial court correctly noted:

> . . . . [t]here is no reasonable probability that this would have affected the verdict. The mental processes of Detective Bronson had very little or nothing to do with the facts of this case that were presented to a jury.

* * *

Appendix C

> The effective impeachment of Detective Bronson could not possibly have affected whether or not the jury believed Beckett's testimony that he personally murdered Susan Hamwi and that he did so because that is what he was hired and paid to do by the Defendant.
>
> * * *
>
> The timing and motives behind the grant of immunity to Beckett seem irrelevant to the resolution of the case against this Defendant.

Id. at pp. 7-8.

Bronson's knowledge was immaterial to the fundamental question of guilt or innocence. Whether or not Bronson knew the degree to which Beckett Sr. was involved in the murder when he granted Beckett Sr. immunity (and the chronology of Bronson's knowledge) has no bearing on whether or not Petitioner hired Beckett Sr. to kill his ex-wife. In sum, Bronson's credibility would not have affected Beckett Sr.'s credibility in the eyes of a jury.

Under the totality of the circumstances, the undersigned finds no deficiency sufficient to support a claim of ineffective assistance, much less subsequent prejudice, or a different outcome at trial. Simply put, Mr. Bogenschutz did the best he could with the cards he was dealt. Consistent with the foregoing, this Court finds that the trial court properly applied *Strickland.*

Appendix C

Failure to call Petitioner in his own Defense

Lastly, Petitioner claims that Mr. Bogenschutz was ineffective in that he failed to adequately advise him on the issue of testifying at trial. This argument is completely without merit.

The law in this area is well settled. While defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense. *U.S. v. League*, 953 F.2d 1525, 1533 (11th Cir. 1992) quoting *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985)(trial counsel "is still only an assistant to the defendant and not the master of the defense."). When a criminal defendant does not testify on his or her own behalf at trial, the trial record should reflect that the defendant's waiver of his right to testify was knowing and intelligent. *League*, 953 F. 2d at 1542 (Clark, S.J., dissenting). The wisdom or unwisdom of the defendant's choice does not diminish his right to make it. *See Wright v. Estelle*, 572 F.2d 1071 (5th Cir.)*(en banc)*, cert. denied, 439 U.S. 1004 (1978).

Here, the record is replete with evidence supporting the conclusion that Petitioner knowingly and voluntarily opted not to testify. The relevant portion of the record colloquy states:

> THE COURT: Your lawyer rested without you taking the stand. You understand that you have an absolute right to take the stand in this case; do you not?

PETITIONER: I do, sir.

THE COURT: And you understand that even if your lawyer disagrees with you, it's your ultimate decision if you desire to take the stand and Mr. Bogenschutz and [sic] thinks otherwise; do you not, then you are the one that prevails and you can take the stand in that case; do you understand that?

PETITIONER: Yes, I do.

THE COURT: . . . it is your desire not to take the stand in this case?

PETITIONER: It's my advice of Counsel, sir.

THE COURT: Do you concur with that advice?

PETITIONER: Yes, sir.

THE COURT: He gives you advice, but the ultimate decision is yours; do you understand that?

PETITIONER: I understand that.

* * *

PETITIONER: We discussed my possible testimony at length and he felt it probably was unnecessary for me to take the stand.

THE COURT: Okay. Now, you understand that you have the absolute right to take the stand if you so desire?

PETITIONER: I believe I answered that yes, Your Honor.

THE COURT: . . . So you understand that independent of any advice, you make the final decision?

PETITIONER: Sir, I am going to make the final decision, but I also have to abide by my Counsel's best advice.

* * *

TRIAL COUNSEL:
And what Mr. Hamwi has suggested to the Court, that it was our, meaning Mrs. Fishman[10] and myself, it was our joint decision to make

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10. The referenced Mrs. Fishman was one of Petitioner's trial counsel.

> the recommendation to him that we did not believe that it was necessary that he testify and that Mr. Hamwi knew and still knows the decision is solely his and rests with him. And I believe he listened to us and listened to the reasons for it. And I believe that the decision is his
>
> * * *
>
> . . . . we told him that it would be our recommendation that he not take the stand, and he weighed those options, and decided that he would follow the recommendation.

[D.E. 17] (T: 6778 - 6781).

Petitioner's clear and unequivocal responses to the trial judge's thorough and detailed questioning leave no doubt that Petitioner knowingly and voluntarily waived his right to testify. Said waiver was made on the record, in open Court, and before a judicial officer.

Indeed, the trial court, who was in a position to observe the interaction between Petitioner and his counsel, noted that there was much conversation between Petitioner and his trial counsel regarding his possible testimony. **[DE 23]**, App., Vol. 6, Tab 151 at p.10. In fact, Petitioner by his own admission, conceded that: (1) the issue was discussed with counsel "at length," (2) he understood his absolute right to testify; (3) he understood that it was he (Petitioner) that would "make

the final decision," and (4) he concurred with counsel's advice.

Such waivers are serious matters and are not to be made lightly. Simply put, a defendant cannot make such unequivocal detailed assertions on the record and then simply claim that he really did not mean it and/or that he was ill-advised. In more ways than one, Petitioner made his decision, and now has to live by it.

Having found that the decision to not testify was made freely by a well-informed Petitioner, the undersigned shall briefly address the issue of counsel's advice in this regard.

In its order denying the motion for post conviction relief, the trial judge noted:

> . . . . [t]heir [sic] could have been a number of reasons justifying the advice by trial counsel in this case, that Mr. Hamwi not testify. Trial counsel undoubtedly gave a great deal of consideration to every area that the Defendant would have had to explain while being cross-examined by a very experienced and extremely skillful prosecutor.
>
> The Defendant would have had to explain to the jury his association and friendship with his ex-wife's killer. He would have had to provide details about when he learned that Beckett killed his ex-wife and why he never

> informed the authorities about Beckett. He would have had to explain why he pretended to not know what Beckett was talking about during their recorded conversations. He would have had to explain his prior behavior, prior to the murder, in asking people if they knew where he could find a hit man to kill his wife. The Defendant would also have had to explain away the coincidence of advancing Beckett money just before the murder and giving him a job with his construction company immediately after the murder.

See Id.

The undersigned agrees. The fact that these topics, among others, could have been broached by the prosecutor during Petitioner's testimony provides sufficient justification for trial counsel's advice that Petitioner not testify. Accordingly, Petitioner has failed to show deficient performance by counsel, or prejudice in this regard. Even assuming *arguendo* deficient performance by counsel, Petitioner has failed to show that there exists a reasonable probability of a different outcome had he testified.

Consistent with the foregoing, the undersigned finds that: (1) Petitioner, not trial counsel, made a voluntary and informed decision not to testify; (2) trial counsel's advice that Defendant not testify was proper and does not meet the requirements for ineffective assistance under Strickland; and (3) the trial court did not unreasonably misapply the Strickland test, and the appellate court correctly affirmed said decision.

Appendix C

Evidentiary Hearing

Petitioner is requesting an evidentiary hearing on the *Brady* claims and the ineffective assistance claims. Petitioner concedes that all other claims may be resolved without an evidentiary hearing.

In 1996, The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") directly modified 28 U.S.C. §2254 in numerous ways, including limiting the power of the federal courts to grant evidentiary hearings in habeas cases. The relevant provision of AEDPA states in pertinent part:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim *unless* the applicant shows that,
>
> (A) the claim relies on —
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; *and*

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2254 (2)(emphasis added).

In other words, a habeas petitioner is not entitled to an evidentiary hearing where the proffered evidence would not affect the resolution of a claim. See e.g., *Breedlove* at 952; *Bolender v. Singletary*, 16 F.3d 1547, 1555 n.9 (11th Cir. 1994). Similarly, no hearing is required where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous. *Holmes*, 876 F.2d at 1553.

Because this Court has determined that the state court did not act contrary to, or unreasonably apply, federal law, it must defer to the state court's adjudication on the claims. *Breedlove*, 279 F.3d at 960 ("In the post AEDPA era, we do not conduct an independent review of claims that have been addressed on the merits by the state courts."). Petitioner has not established that the facts underlying the claim establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. An evidentiary hearing would not assist in the resolution of Petitioner's claims because the prejudice prong of Strickland remains unsatisfied.

Consistent with the foregoing, this Court finds that Petitioner has failed to meet the requirements for an evidentiary hearing as to *any* of his claims. Thus, it is **RESPECTFULLY RECOMMENDED** that Petitioner's request for such hearing be **DENIED**.

Conclusion

In sum, this Court recognizes that this is not a typical § 2254 habeas petition. The sordid facts and the tortuous procedural history involved herein stem from a twenty-four year old gruesome murder. The record includes, *inter alia*, a wrongful conviction, a subsequent exoneration, a separate (albeit related) rape and murder, at least four trial judge recusals, and the instant murder trial (replete with its cast of motley characters) that lasted over two months. The State's star witness was an undesirable self-proclaimed murderer who — in every sense of the word — got away with murder.

This tortured history notwithstanding, a review of the record and the applicable law reveals that Petitioner was well represented and received a fair and just trial. The record shows no denial of any constitutional rights. As such, pursuant to § 2254, and the relevant case law interpreting AEDPA, Petitioner's conviction and subsequent life sentence must stand.

Appendix C

Recommendation

Accordingly, pursuant to 28 U.S.C. §2254, it is **RESPECTFULLY RECOMMENDED** that Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody be **DENIED**, and his Amended Request for Hearing be **DENIED**.

Pursuant to 28 U.S.C. §636(b)(1)(c), the parties may file written objections to this Report and Recommendation with the Honorable Cecilia M. Altonaga, United States District Judge, within ten (10) days of receipt. Failure to file timely objections shall bar the parties from attacking on appeal any factual findings contained herein. *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149, *reh'g denied*, 7 F.3d 242 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. Denied*, 488 U.S. 958, 109 S. Ct. 397 (1988).

RESPECTFULLY RECOMMENDED in Chambers, at Miami, Florida, this 15th day of November 2007.

s/ William C. Turnoff
William C. Turnoff
United States Magistrate Judge